UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

JUDITH L. JOHNSON,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 05-202-P-S***
	)	
THE UNIVERSITY OF	***)***	
MAINE SYSTEM,	***)***	
	)	
Defendant	***)***	

MEMORANDUM DECISION ON DEFENDANT'S MOTION TO EXCLUDE AND RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The defendant University of Maine System ("University System") seeks summary judgment as to all counts of plaintiff and former employee Judith L. Johnson's complaint against it. *See* Defendant's Motion for Summary Judgment ("Defendant's S/J Motion") (Docket No. 21) at 1. Relatedly, the defendant seeks exclusion of testimony of an economic expert bearing on a claimed "income differential." *See* Defendant's Motion To Exclude Certain Expert Testimony ("Motion To Exclude") (Docket No. 20) at 1. For the reasons that follow, I grant the defendant's motion to exclude and recommend that its summary-judgment motion be granted.

I. Summary Judgment Standards

A. Federal Rule of Civil Procedure 56

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Santoni v. Potter*, 369 F.3d 594, 598 (1st Cir. 2004). "In this regard, 'material' means that a contested

fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Santoni*, 369 F.3d at 598. Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

B. Local Rule 56

The evidence the court may consider in deciding whether genuine issues of material fact exist for purposes of summary judgment is circumscribed by the Local Rules of this District. *See* Loc. R. 56. The moving party must first file a statement of material facts that it claims are not in dispute. *See* Loc. R. 56(b). Each fact must be set forth in a numbered paragraph and supported by a specific record citation. *See id.* The nonmoving party must then submit a responsive "separate, short, and concise" statement of material

facts in which it must "admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts[.]" Loc. R. 56(c). The nonmovant likewise must support each denial or qualification with an appropriate record citation. *See id*. The nonmoving party may also submit its own additional statement of material facts that it contends are not in dispute, each supported by a specific record citation. *See id*. The movant then must respond to the nonmoving party's statement of additional facts, if any, by way of a reply statement of material facts in which it must "admit, deny or qualify such additional facts by reference to the numbered paragraphs" of the nonmovant's statement. *See* Loc. R. 56(d). Again, each denial or qualification must be supported by an appropriate record citation. *See id*.

Failure to comply with Local Rule 56 can result in serious consequences. "Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly controverted." Loc. R. 56(e). In addition, "[t]he court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment" and has "no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of fact." *Id*.; *see also, e.g., Cosme-Rosado v. Serrano-Rodriguez*, 360 F.3d 42, 45 (1st Cir. 2004) ("We have consistently upheld the enforcement of [Puerto Rico's similar local] rule, noting repeatedly that parties ignore it at their peril and that failure to present a statement of disputed facts, embroidered with specific citations to the record, justifies the court's deeming the facts presented in the movant's statement of undisputed facts admitted.") (citations and internal punctuation omitted).

II. Factual Context

A. Defendant's Motion To Exclude

As a threshold matter, I address the defendant's motion to exclude certain testimony of economic expert Mark Filler. *See* Motion To Exclude at 1. Filler, a certified public accountant, prepared a summary of the plaintiff's economic damages that included an item he termed "salary differential." *See* Tabs 2-3 to *id*. For purposes of calculation of that damages item, Filler assumed that the plaintiff was the subject of an unequal-pay violation. *See* Deposition of Mark G. Filler, CPA, Tab 1 to Motion To Exclude, at 53. He compared the plaintiff's actual and projected salaries from 1998 onward with actual and projected salaries of three male colleagues whose names were provided by the plaintiff or her counsel. *See id*. at 28-29; Tab 2 to Motion To Exclude.

The defendant seeks to exclude Filler's testimony as to "salary differential" damages on grounds, *inter alia*, that it is irrelevant, the plaintiff having forfeited any unequal-pay claim by failing to articulate one in her charge of discrimination filed with the Maine Human Rights Commission ("MHRC"). *See generally* Motion To Exclude. I agree.

A litigant wishing to press an unequal-pay claim pursuant to either Title VII or the Maine Human Rights Act ("MHRA") must exhaust administrative remedies. *See, e.g., Jorge v. Rumsfeld*, 404 F.3d 556, 564 (1st Cir. 2005) ("[I]n a Title VII case, a plaintiff's unexcused failure to exhaust administrative remedies effectively bars the courthouse door."); *Bishop v. Bell Atl. Corp.*, 299 F.3d 53, 58 (1st Cir.2002) ("Like Title VII, the MHRA requires that a plaintiff file a discrimination claim at the agency level before proceeding to court.").[1]

[1] The plaintiff does not suggest that her unequal-pay claim falls under a rubric other than Title VII or the MHRA. *See* Plaintiff's Opposition to Defendant's Motion for Summary Judgment ("Plaintiff's S/J Opposition") (Docket No. 33) at 19-23, incorporated by reference in Plaintiff's Opposition to Defendant's Motion To Exclude Certain Expert Testimony (Docket No. 25) at 1 n.1.

As the plaintiff concedes, she did not make an unequal-pay claim in her MHRC charge of discrimination filed March 17, 2005. *See* Defendant's Statement of Material Facts in Support of Motion for Summary Judgment ("Defendant's SMF") (Docket No. 22) ¶ 140; Plaintiff Judith L. Johnson's Amended Response to Defendant's Statement of Material Facts ("Plaintiff's Opposing SMF") (Docket No. 34) ¶ 140. She testified that she did not think she complained to the University of Southern Maine ("USM") or to the MHRC that she experienced discriminatory unequal pay after she settled a 1997 unequal-pay claim. *Id*. ¶ 141; *see also id*. ¶¶ 10-11. While, as she observes, *see* Plaintiff's S/J Opposition at 19, a Title VII lawsuit is not "inevitably limited to the allegations in the administrative complaint," *Jorge*, 404 F.3d at 565, such a suit still is "constrained by those allegations in the sense that the judicial complaint must bear some close relation to the allegations presented to the agency[,]" *id*. Put differently, '[a] Title VII suit may extend as far as, but not beyond, the parameters of the underlying administrative charge." *Id*. Pursuant to this so-called "scope of investigation" test, "a lawsuit is limited to claims that must reasonably be expected to have been within the scope of the EEOC's investigation[.]" *Clockedile v. New Hampshire Dep't of Corr*., 245 F.3d 1, 4 (1st Cir. 2001) (citation and internal punctuation omitted); *see also Frost v. State*, No. Civ. A. CV-02-237, 2005 WL 3340215, at *7 (Me. Super. Ct. Oct. 7, 2005) (applying First Circuit's "scope of investigation" test to determine whether complainant exhausted remedies for MHRC purposes).

In her charge of discrimination, the plaintiff alleged that she had been subjected to retaliation, as well as discrimination on the basis of sex and age, commencing on September 30, 2004 and continuing. *See* Charge of Discrimination, Exh. A to Amended Complaint, at 1-2. She asserted that she had been informed on September 30, 2004 that her position as Director of Institutional Research would be terminated, that the stated reasons for the termination were pretext, and that she believed she had been terminated in retaliation

for a 1997 charge of sex discrimination as well as on the basis of gender and age. *See* Exh. A to Charge of Discrimination at 1-6. She gave several specific examples of discrimination and/or retaliation, including that:

1. She had been informed by a former University System dean that she was regarded as a "bitch and troublemaker" and that her termination was in retaliation for her 1997 sex-discrimination complaint. *See id*. at 2.

2. She had been passed over for the position of Chief Information Officer ("CIO"), which went to a less qualified male who was paid considerably more than she was. *See id*. at 3, 5.

3. She had been officially told during her grievance hearing by a University System representative that "most people we terminate have husbands with good paying jobs to support them." *Id*. at 5.

4. Had she remained employed, she would have been eligible in six years for a retirement package that would have cost her employer a considerable amount of money. *See id*. University representatives had made comments making plain the University System's desire to terminate older, more highly paid employees to reduce costs. *See id*. at 6.

The foregoing charge of discrimination could not reasonably be expected to lead to an investigation into whether the plaintiff had been paid less than her male counterparts since 1998. The plaintiff did complain that she was passed over for the higher paying CIO job; however, she did not indicate it entailed the same work as the job she then was performing. *Compare, e.g., Rathbun v. AutoZone, Inc*., 361 F.3d 62, 77 (1st Cir. 2004) (plaintiff made out *prima facie* case of unequal pay when she adduced evidence tending to show she was member of protected class, performed her job in keeping with employer's expectations and "was paid less than men who held the same position").

While I find no First Circuit case on point, courts in other jurisdictions applying the "scope of investigation" test to similar facts have held that plaintiffs failed to exhaust administrative remedies with respect to unequal-pay claims. *See, e.g., Govan v. Missouri Dep't of Corr.*, No. 2:02CV72JCH, 2006 WL 83489, at *2 (E.D. Mo. Jan. 12, 2006) ("In the instant case, Plaintiff's Charge of Discrimination before the EEOC presented numerous, extremely specific examples of alleged discrimination, none of which hinted of wage discrimination. Plaintiff's statement in the charge regarding differential treatment, followed as it was by specific examples not including unequal pay, was insufficient to fulfill her administrative exhaustion requirements.") (citations omitted); *Brown v. Dr. Pepper/Seven Up, Inc.*, No. CIV.A.399CV0156 P, 2000 WL 370669, at *10 (N.D. Tex. Apr. 11, 2000) ("Plaintiff's EEOC charge alleged sex discrimination based upon her constructive discharge, denial of promotion to Senior Vice President position, and denial of severance benefits. All of these charges relate to a very specific period of time at the very end of her employment with DPSU. . . . The EEOC did not perform any in-depth investigation of Plaintiff's claims. However, a reasonable investigation could have been limited to the circumstances surrounding Plaintiff's resignation from DPSU and may not have expanded to include Plaintiff's last two years at DPSU. Plaintiff's claims for unequal pay and prior denials of promotions are beyond the scope of her EEOC charge.") (citation and footnote omitted); *Snooks v. University of Houston*, 996 F. Supp. 686, 690 (S.D. Tex. 1998) ("In her EEOC complaint, Plaintiff made no mention of unequal pay, and has therefore, failed to exhaust her administrative remedy on that issue."); *Sigmon v. Parker Chapin Flattau & Klimpl*, 901 F. Supp. 667, 675 (S.D.N.Y. 1995) ("Plaintiff's EEOC charge focuses on her allegedly discriminatory termination. . . . Plaintiff does not argue in her EEOC charge that part of this discriminatory treatment included a disparity in her salary compared to similarly experienced male associates. Therefore, because

this claim is not 'reasonably related' to her EEOC charge, the Court lacks jurisdiction to hear plaintiff's Title VII wage disparity claim."). That is the case here, as well.

Inasmuch as the plaintiff is barred, on the basis of failure to exhaust administrative remedies, from bringing an unequal-pay claim, any testimony by Filler regarding a "salary differential" is irrelevant. Accordingly, I grant the defendant's motion to exclude Filler's testimony on that subject.

B. Defendant's Objections to Plaintiff's Statements of Material Facts

A second threshold issue requires resolution. In its reply memorandum, the defendant lodges a blanket objection to thirty-seven enumerated paragraphs of the plaintiff's opposing statement of material facts on the ground that, in violation of Local Rule 56, they do not constitute proper denials or qualifications, should have been set forth instead as additional facts, are conclusory and argumentative and are based on inadmissible evidence. *See* Defendant's Reply to the Plaintiff's Opposition to the Defendant's Motion for Summary Judgment ("Defendant's S/J Reply") (Docket No. 38) at 3. The defendant having made no attempt to specify which of the enumerated paragraphs suffers which of these flaws, or in what manner some or all of this evidence purportedly is inadmissible, its objections are not cognizable. That said, the court retains discretion, even in the absence of an objection, to disregard statements that do not comply with the requisites of Local Rule 56 – for example, because the statement constitutes an argument or a conclusory assertion rather than a statement of fact, or is not supported by the citation given. *See, e.g.*, Loc. R. 56(f). As per my customary practice, I have exercised that discretion in this case.

The defendant also objects in part or in whole to a number of paragraphs of the plaintiff's statement of additional material facts. *See generally* Defendant's Reply Statement of Material Facts in Support of Motion for Summary Judgment ("Defendant's Reply SMF") (Docket No. 39); *see also generally* Plaintiff's Additional Statement of Material Facts ("Plaintiff's Additional SMF"), commencing at page 18 of Plaintiff's

Opposing SMF. I omit the following statements of additional facts in their entirety, sustaining the defendant's objections thereto on the following grounds:

1. Plaintiff's Additional SMF ¶ 149, on the basis that it is not fairly supported by the record citation given, *see* Defendant's Reply SMF ¶ 149.

2. Plaintiff's Additional SMF ¶ 150, on the basis of lack of personal knowledge and the conclusoriness of the statement, *see* Defendant's Reply SMF ¶ 150.

3. Plaintiff's Additional SMF ¶ 186, on the basis that it is not fairly supported by the record citation given, *see* Defendant's Reply SMF ¶ 186.

4. Plaintiff's Additional SMF ¶ 192, on the basis that it is not fairly supported by the record citation given, *see* Defendant's Reply SMF ¶ 192.

5. Plaintiff's Additional SMF ¶ 220, on the basis that it sets forth argument and conclusion rather than facts, *see* Defendant's Reply SMF ¶ 220.

6. Plaintiff's Additional SMF ¶ 237, on the basis that it sets forth argument and conclusion rather than facts and is, in any event, irrelevant, *see* Defendant's Reply SMF ¶ 237.

To the extent I have overruled, in whole or in part, objections to specific statements of additional facts, or an objection concerns only a portion of such a statement, I have addressed those objections below in the context of setting forth facts material to resolution of the instant summary-judgment motion.

C. Facts Cognizable on Summary Judgment

With the foregoing ancillary issues resolved, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56, reveal the following relevant to this recommended decision: [2]

USM is one of the seven universities within the University System. Defendant's SMF ¶ 1; Plaintiff's Opposing SMF ¶ 1. Richard L. Pattenaude has been the President of USM since 1991. *Id*.

In 1986, the plaintiff was employed as a Research Assistant in the Office of Testing and Assessment ("TAC") at USM. *Id*. ¶ 2. In 1987 her job was reclassified, and she became a Research Assistant I. *Id*. ¶ 3. Later in 1987 she became the Assistant Director of the TAC. *Id*. ¶ 4. In 1990 she became its Director. *Id*. ¶ 5. Between September 15, 1993 and May 15, 1995 USM granted the plaintiff a leave of absence to complete her doctorate. *Id*. ¶ 7. First, she was granted leave for six months at full pay, then she received a two-month leave at half pay, then she was granted a year's leave with no pay. *Id*.

In 1997 the plaintiff filed a claim for unequal pay with the MHRC ("1997 Action"). *Id*. ¶ 10. Her claim of discrimination was settled. *Id*. ¶ 11. Her salary was increased, and she was paid a sum of $30,000 broken down as follows: one $10,000 payment at the time the settlement agreement was filed, $10,000 on or about July 1, 1998 and $10,000 on or about July 1, 1999. *Id*.[3] She also received retroactive pay for three distinct time periods totaling $6,181.60. *Id*.[4] The cost of the lump-sum settlement payments was charged to the budget of the TAC, of which the plaintiff was Director, in each of the payout

[2] As noted above, Local Rule 56 requires a party responding to a statement of material facts to admit, deny or qualify the underlying statement. *See* Loc. R. 56(c)-(d). The concept of "qualification" presupposes that the underlying statement is accurate but in some manner incomplete, perhaps even misleading, in the absence of additional information. Except to the extent that a party, in qualifying a statement, has expressly controverted all or a portion of the underlying statement, I have deemed it admitted.

[3] My recitation incorporates the plaintiff's qualification.

[4] My recitation incorporates the plaintiff's qualification.

years. *Id*. ¶ 12.[5] The allocation of the settlement payments to the TAC account was standard accounting procedure at USM and was consistent with generally accepted accounting principles. *Id*. ¶ 13.[6] The charging of the $10,000 amount resulted in a total expenditure for the TAC in fiscal year 1999-2000 of $194,876 against a current budget of $177,368. *Id*. ¶ 14.[7] The TAC's budget was never increased during the payout years to account for the $10,000 settlement payments. Plaintiff's Additional SMF ¶ 153; Johnson Aff. ¶ 5. Accordingly, the plaintiff had to try to operate the TAC in those years with at least $10,000 less than she should have had, and was unable to stay within budget. *Id*.[8]

In 2000 the plaintiff requested a six-month professional-development leave to write a book on distance education. Defendant's SMF ¶ 16; Plaintiff's Opposing SMF ¶ 16. She was granted a three-month leave at full salary from May 15, 2001 to August 31, 2001 rather than the six-month leave she requested. *Id*. ¶ 17.[9] Pattenaude granted her a three-month leave rather than a six-month leave because he wanted her to adjust the timing to fit the work cycle at USM, and he asked her to take her leave in the summer. *Id*. ¶ 18.[10] Pattenaude originally denied the plaintiff's sabbatical request in its entirety, after both John Bay (the plaintiff's immediate supervisor at the time) and Mark Lapping (Bay's supervisor) had approved it. Plaintiff's Additional SMF ¶ 154; Defendant's Reply SMF ¶ 154. The ground for

[5] My recitation incorporates the plaintiff's qualification.

[6] My recitation incorporates the plaintiff's qualification. I omit the defendant's further statement that the charging of the payouts had no adverse impact on the TAC's budget, *see* Defendant's SMF ¶ 13, which the plaintiff denies, *see* Plaintiff's Opposing SMF ¶ 13; Affidavit of Judith L. Johnson ("Johnson Aff."), Exh. 2 to Declaration of Lee H. Bals in Support of Plaintiff's Opposition to Defendant's Motion for Partial [sic] Summary Judgment ("Bals Decl.") (Docket No. 31), ¶ 5.

[7] My recitation incorporates the plaintiff's qualification.

[8] The defendant's objection to paragraph 153 on the ground that it is argumentative and conclusory, *see* Defendant's Reply SMF ¶ 153, is sustained with respect to the plaintiff's assertion that her budget "was negatively impacted by the settlement" and otherwise overruled. The defendant alternatively denies the plaintiff's assertions, *see id*.; however, I view the record in the light most favorable to the plaintiff, as nonmovant.

[9] My recitation incorporates the plaintiff's qualification (labeled a denial, but effectively a qualification).

[10] I omit the plaintiff's conclusory and argumentative qualification that she believes this explanation was pretextual. *See* Plaintiff's Opposing SMF ¶ 18.

Pattenaude's denial was that "professional staff do not write books." *Id*. ¶ 155.[11] Pattenaude only granted the shorter sabbatical after requesting the plaintiff to provide an additional proposal in September 2000 and, even then, did not respond to her repeated requests for a decision until January 2001. Plaintiff's Additional SMF ¶ 156; Johnson Aff. ¶ 7.[12] The plaintiff had informed Pattenaude in a letter dated September 19, 2000 that she had a book contract. Plaintiff's Additional SMF ¶ 157; Defendant's Reply SMF ¶ 157.[13]

In 2001, USM issued a Proposal to Develop an Office of Institutional Research and Evaluation ("OIR Proposal"). Plaintiff's Additional SMF ¶ 167; Johnson Aff. ¶ 13. The proposal stated on the first page:

> The Strategic Plan calls for the setting of realistic goals for growth that are informed by assessment and evaluation activities that benchmark outcomes for us at both a departmental/school/college level and an institutional level. This, combined with the concern noted by the NEASC accreditation team that USM develop a coherent approach to institutional research, reinforces our assessment and evaluation agenda. Both the Plan and the comment by the NEASC team suggest that we need to review and restructure our approach to institutional research, in particular to eliminate the fragmentation that currently exists.

Plaintiff's Additional SMF ¶ 167; Defendant's Reply SMF ¶ 167.[14] The plaintiff was not given an opportunity to provide any input into the OIR Proposal notwithstanding the fact that she was, at the time,

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[11] The defendant qualifies this statement, asserting, *inter alia*, that (i) Pattenaude wrote to Lapping on July 20, 2000 that he could not support the plaintiff's sabbatical request because "[d]istance education is not part of her USM work. . . . [T]he benefit[s] to USM of the book are indirect & secondary[,]" and (ii) Pattenaude wrote to Bay on September 27, 2000 that "Admin. sabbatical is not about doing academic scholarship. . . . Not approved. . . . Again note – this is not a comment on the quality of the work." Defendant's Reply SMF ¶ 155; Second Affidavit of Richard L. Pattenaude ("Second Pattenaude Aff."), attached to *id*., ¶¶ 2-3 & Exhs. A1 & A2 thereto.

[12] I sustain the defendant's objection to paragraph 156 as originally worded, *see* Defendant's Reply SMF ¶ 156, in which the plaintiff stated in argumentative fashion that Pattenaude only granted the shorter sabbatical "after forcing" her to provide more information, *see* Plaintiff's Additional SMF ¶ 156. The defendant denies that Pattenaude did not respond to the plaintiff, *see* Defendant's Reply SMF ¶ 156; however, I view the record in the light most favorable to the plaintiff, as nonmovant.

[13] I sustain the defendant's objection to paragraph 157 as originally worded, *see* Defendant's Reply SMF ¶ 157, on the ground that the plaintiff fails to reveal the source of any personal knowledge as to what Pattenaude knew.

[14] My recitation incorporates the defendant's qualification. I sustain the defendant's objection to the plaintiff's characterization of why the OIR Proposal was drafted, *see* Defendant's Reply SMF ¶ 167, on the basis of her lack of

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the only employee at USM who conducted institutional research for USM. Plaintiff's Additional SMF ¶ 167; Johnson Aff. ¶ 13.[15]

In the OIR Proposal, Rosa Redonnett and Provost and Vice-President for Academic Affairs Joseph Wood defined institutional research as follows:

> The purpose of institutional research is to provide information to USM's leadership that it can use to implement and refine institutional priorities. Specifically, the information and analyses should assist USM in making decisions related to the Strategic Plan, programs and services, and resource utilization (financial, human, and physical).
>
> Necessarily then, the priorities for institutional research are set by the leadership of USM and the structure of this area should be such [as] to ensure that these priorities are clear and that institutional research has access to the data/information it needs to appropriately perform its function.
>
> In order to achieve its purpose, institutional research at USM needs to function at a Meta-level. This means that it does not routinely engage in research and evaluation activities at the departmental/office level, unless so directed by USM's leadership, as reflected in institutional priorities, or as part of its role in consultation . . . .

Plaintiff's Additional SMF ¶ 168; Defendant's Reply SMF ¶ 168.[16]

The OIR Proposal stated, among other things: "While some of the analyses performed by Institutional Research will involve original data collection, much will involve information drawn from University databases and other sources. . . . Thus, given the decentralized management of these data sources, much of what the office will need to do is to coordinate with those areas having responsibility for

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personal knowledge of the same. The NEASC, or New England Association of Schools and Colleges, is a regional accrediting organization; in order to receive federal financial aid, local colleges and universities, including USM, must be accredited by NEASC. Plaintiff's Additional SMF ¶ 164; Defendant's Reply SMF ¶ 164

[15] The defendant denies this assertion, *see* Defendant's Reply SMF ¶ 167; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.

[16] My recitation incorporates the defendant's qualification. The defendant denies that Wood and Redonnett drafted the OIR Proposal, *see* Defendant's Reply SMF ¶ 168; however, I view the facts in the light most favorable to the plaintiff, as nonmovant. Redonnett's full name and Wood's full name and title are set forth in paragraphs 22 and 23 of the Defendant's SMF.

managing those data . . . or having a stake in the research being conducted[.]" *Id.* ¶ 169.[17] The plaintiff and the Office of Institutional Research ("OIR") did perform a substantial amount of data collection, as well as analysis, while the OIR was in existence. Plaintiff's Additional SMF ¶ 170; Johnson Aff. ¶ 14.[18]

In 2001, the TAC was split into two different offices. Defendant's SMF ¶ 21; Plaintiff's Opposing SMF ¶ 21. One was the OIR, of which the plaintiff became Director, and the other was the Office of Academic Assessment, of which Susan King became Director. *Id.* Before she worked as Director of Academic Assessment, King worked for the plaintiff at the TAC. Plaintiff's Additional SMF ¶ 174; Defendant's Reply SMF ¶ 174. During her time at TAC, King performed institutional research. *Id.* ¶ 175. Before the reorganization was finalized, Wood learned that the plaintiff did not think it appropriate for her to report to Susan Campbell, head of the newly created Division of Advising and Academic Resources ("DAAR") within the Division of Enrollment Management. Defendant's SMF ¶ 23; Plaintiff's Opposing SMF ¶ 23; *see also id.* ¶ 22. Campbell was the ex-spouse of David Silvernail, who was at that time and remains the plaintiff's significant other. *Id.* ¶ 23. Wood agreed with the plaintiff, and it was decided that the OIR would continue to report directly to the Provost and remain within the Division of Academic Affairs. *Id.* ¶ 24.

The Office of Academic Assessment, as part of the DAAR, became a part of the Division of Enrollment Management and no longer was controlled by Wood's Division of Academic Affairs. *Id.* ¶ 25. The Office of Academic Assessment oversees all of the student testing programs and scanning functions as well as the first-year assessment projects. *Id.* ¶ 26.[19]

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[17] My recitation incorporates, in part, the defendant's qualification.

[18] The defendant's objection to this statement on the ground that the word "substantial" is conclusory, *see* Defendant's Reply SMF ¶ 170, is overruled.

[19] The plaintiff qualifies this statement, asserting that the Office of Academic Assessment also has done "any other

(*continued on next page*)

In 2001, after the TAC was split, Wood moved the OIR from its location in Masterton Hall to an office at John Roberts Road in South Portland. *Id*. ¶ 28. The move to the larger space at John Roberts Road was necessitated by Wood's need for office space for full-time faculty pursuant to the faculty's union contract. *Id*. During her abbreviated sabbatical, the plaintiff was unable to devote all of her attention to writing her book on distance education inasmuch as she was constantly interrupted by various work-related issues, such as a notification on June 1, 2001 that her office was being moved to a then-unknown location. Plaintiff's Additional SMF ¶ 158; Johnson Aff. ¶ 9.[20] As a result of this notification, the plaintiff spent a week of her sabbatical time locating new office space for the TAC and arranging for renovation of the same. Plaintiff's Additional SMF ¶ 159; Defendant's Reply SMF ¶ 159.[21]

During the summer of 2001, the plaintiff requested that her new office at John Roberts Road be carpeted and painted and that she be allowed to pay for new partitions out of her office budget. Defendant's SMF ¶ 31; Plaintiff's Opposing SMF ¶ 31. Wood approved the expenditure of USM funds for the painting of the office and for new carpeting and permitted the plaintiff to use money from her budget to pay for the partitioning she requested. *Id*. ¶ 32. During her sabbatical, the plaintiff also had to deal with budget, staffing and reporting issues related to the split of the TAC into the DAAR and the OIR. Plaintiff's Additional SMF ¶ 160; Defendant's Reply SMF ¶ 160. Due to these issues, the plaintiff was unable to finish her book during the three-month sabbatical, and she requested another three months (which would have brought her sabbatical up to the six-month standard set in her union contract). Plaintiff's Additional

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assessment projects that were assigned to [it] or asked of [it]." Plaintiff's Opposing SMF ¶ 26; Deposition of Susan King ("King Dep."), Tab 12 to Defendant's SMF, at 8.

[20] The defendant's objection to use of the word "constantly" on the ground that it is conclusory, *see* Defendant's Reply SMF ¶ 158, is overruled. The defendant alternatively denies that the plaintiff was notified on June 1, 2001 that her office was being moved to an unknown location, *see id*; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.

SMF ¶ 161; Johnson Aff. ¶ 10.[22] This sabbatical extension request was denied, and the plaintiff was given only two additional weeks. Plaintiff's Additional SMF ¶ 162; Defendant's Reply SMF ¶ 162.

In September 2001, the plaintiff requested that she be allowed to attend Provost staff meetings, which request was denied because only the deans and associate provosts attended those meetings. Defendant's SMF ¶ 30; Plaintiff's Opposing SMF ¶ 30.[23]

In 2003, USM did not renew its lease on the John Roberts Road building because the majority of the occupants of that office space were science research faculty who were moving into the new research center built at USM. *Id*. ¶ 34. Because the lease was not renewed, all of the occupants of the space at John Roberts Road, including the OIR, were moved. *Id*. In December 2003, OIR was moved to 99 School Street in Gorham. *Id.* ¶ 35. The OIR was moved to the John Roberts Road location in 2001 in part because it made sense to house it with other research-based offices already located there. Plaintiff's Additional SMF ¶ 179; Defendant's Reply SMF ¶ 179. In 2003, after the plaintiff was notified that USM was not renewing the lease at the John Roberts Road location, all of the other research departments were moved into a newly constructed research building. *Id*. The OIR and the plaintiff were not given the opportunity to, and did not, join them. *Id.*[24]

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[21] The defendant's objection to the use of the word "forced" in paragraph 159 as originally worded, *see* Defendant's Reply SMF ¶ 159, is sustained.

[22] The defendant denies that the plaintiff was entitled to a six-month sabbatical per any union contract, *see* Defendant's Reply SMF ¶ 161; however, I do not view the underlying statement as asserting that she was "entitled" to a sabbatical per the contract.

[23] The plaintiff qualifies this statement, asserting that she made multiple requests to attend the Provost staff meetings because she reported directly to the Provost, and Wood had told her she needed to be more informed about what was happening at the administrative level in order to conduct institutional research properly. Plaintiff's Opposing SMF ¶ 30; Johnson Aff. ¶ 16.

[24] The defendant qualifies this statement, asserting that the other research people were science research faculty. Defendant's Reply SMF ¶ 179; Deposition of Joseph S. Wood ("Wood Dep."), Tab 16 to Defendant's SMF, at 44-45.

The plaintiff alleges that the provision of the three-month paid professional leave rather than the six-month paid professional leave that she requested is an act of retaliation for bringing the 1997 Action. Defendant's SMF ¶ 19; Plaintiff's Opposing SMF ¶ 19. In the Acknowledgements section of the book she wrote, *Distance Education; The Complete Guide to Design, Delivery and Improvement*, she stated, in part: "I wish to express my appreciation to Dr. Richard L. Pattenaude, President of the University of Southern Maine (USM), and Dr. Joseph S. Wood, Provost and Vice President for Academic Affairs at USM, for granting me a sabbatical during the summer so I could devote my time to writing." *Id*. ¶ 20. While the plaintiff did in fact mention Wood and Pattenaude in the Acknowledgements section of her book, she did so only because it was the professional, customary and courteous thing to do; she did not really feel that they were particularly supportive of her book or of her. Plaintiff's Additional SMF ¶ 163; Defendant's Reply SMF ¶ 163.

The plaintiff believes that the two moves of her offices, the granting of her request for a sabbatical for only three months and then for only an additional two weeks, the allocation of the $10,000 settlement payments to the TAC account for budgeting purposes and the denial of her request to fill an OIR research-assistant position constitute retaliation for her filing of the 1997 Action. Defendant's SMF ¶ 36; Plaintiff's Opposing SMF ¶ 36.[25]

Before 2004, USM began considering and planning for the creation of a new Information and Technology ("IT") Division in order to consolidate and centralize USM's IT management and services. *Id*.

[25] My recitation incorporates the plaintiff's qualification concerning multiple $10,000 payments rather than one $10,000 payment. The plaintiff's objection to the statement to the extent it purports to describe the universe of retaliatory actions against her, *see* Plaintiff's Opposing SMF ¶ 36, is overruled. First, the statement does not purport to describe the universe of retaliatory actions. Second, the plaintiff points to no record evidence describing additional retaliatory actions.

¶ 37. [26] In July 2003, Wood alerted the plaintiff through an e-mail to the fact that USM would be looking at an "increased centralization of a number of functions having to do with IS and IT." *Id*. ¶ 38. Wood also stated in that e-mail that he did not know how things would turn out but that "IR will have to be part of this discussion." *Id*.

USM hired a consulting firm, Executive Alliance, to assist it in determining how the new IT Division would be created and constituted. *Id*. ¶ 39. Executive Alliance's report delineated several different models for the structure of the IT Division, some of which included the OIR and some of which did not. *Id*. ¶ 40.[27]

In 2004 Pattenaude appointed William Wells, Associate Provost for Information Technologies and Libraries at USM, to head an IT Reorganization Workgroup ("IT Workgroup") tasked with devising a proposed structure for the new IT Division. Plaintiff's Additional SMF ¶ 181; Defendant's Reply SMF ¶ 181.[28]

On February 6, 2004 Pattenaude sent an e-mail to the USM community addressing issues relating to the budget and restructuring. In that communication, Pattenaude stated:

> First, it's clear that our belt-tightening will continue into the foreseeable future. Our nip-and-tuck strategies can only go so far. At some point, we may need to reduce our work force. My hope is that we can do that by streamlining operations, through attrition, and by leaving positions open. We've avoided lay-offs thus far and I am committed to continuing the course. But there will have to be some significant changes in operations to keep our work force intact.

Id. ¶ 193. On February 29, 2004 Wood sent an e-mail to the plaintiff in which he stated that she would shortly see a "proposal to establish a division of information technology and institutional research and

[26] My recitation incorporates the plaintiff's qualification.
[27] I omit the defendant's further statement that Executive Alliance's PowerPoint presentation suggested that the OIR not be part of the new IT Division, *see* Defendant's SMF ¶ 40, which the plaintiff denies, *see* Plaintiff's Opposing SMF ¶ 40; Wood Dep. Exh. 3, Tab 34 to Defendant's SMF, at 18.
[28] Wells' full name and title are set forth in paragraphs 45 and 48 of the Defendant's SMF.

reporting under direction of a CIO. The idea is to cluster as a sub-division of this division all of the database management, research, and reporting functions. The purpose is to enhance the sharing of data and reduce redundancy in functions. We can discuss in detail when we meet later this week[.]" *Id*. ¶ 194.[29]

At the meeting between Wood and the plaintiff referenced in the e-mail, Wood informed her that the OIR was to be placed in the new IT Division. Plaintiff's Additional SMF ¶ 195; Johnson Aff. ¶ 19.[30] During that meeting, Wood showed the plaintiff a flow chart for the IT Division showing the OIR being relocated into the IT Division. Plaintiff's Additional SMF ¶ 196; Defendant's Reply SMF ¶ 196. At the same meeting, the plaintiff requested that she be considered for the CIO position in the new IT Division. Plaintiff's Additional SMF ¶ 197; Johnson Aff. ¶ 20.[31] Wood informed her that Wells already had been selected for the position. *Id*. The plaintiff then asked to be considered for the directorship of one of the departments in the new IT Division; Wood told her that the request would be considered. Plaintiff's Additional SMF ¶ 198; Johnson Aff. ¶ 20.[32]

After meeting with Wood, the plaintiff wrote a letter to Pattenaude regarding the impact that the restructuring of the IT Division would have on the OIR. Defendant's SMF ¶ 42; Plaintiff's Opposing SMF ¶ 42. Specifically, she stated:

> The second area on which I would like to offer my comments is the restructuring of Information Technology/Institutional Research and Reporting. Joe shared with me the proposed IT/IS organizational structure. We discussed it briefly, and I voiced my concerns about having Institutional Research moving yet another level away from where I feel it should be. Having said that, I have done some digging and found that a survey was

[29] My recitation incorporates, in part, the defendant's qualification.
[30] The defendant denies this statement, *see* Defendant's Reply SMF ¶ 195; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.
[31] The defendant denies this statement, *see* Defendant's Reply SMF ¶ 197; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.
[32] The defendant denies this statement, *see* Defendant's Reply SMF ¶ 198; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.

> conducted of all IR offices in the country in 2001. Based on 482 respondents (directors of institutional research offices), over 83% report to a president, vice president, or an associate vice president, and nearly 70% were in an academic, planning or institutional effectiveness division or area. Only 3.7% (N=13) of the offices were found in an information technology division.
>
> As I studied the proposed IT/IS organizational structure for USM, I found that Institutional Research is really a very different kind of office than any of the others in the entire structure. In fact, IR is the only office that uses data from most of the other entities in that proposed structure and is the only office that actually has a formal reporting function driven by policy questions and based on research and statistical analysis.
>
> The Office of Institutional Research is a fairly new concept here at USM, and I know that you and others have struggled with where to situate this function. I have felt that having direct contact with the Provost/Vice President for Academic Affairs is a better relationship than what I knew before I reported to Joe. However, as I have also told Joe, I think that I need more exposure and interaction with those in decision-making positions.
>
> The duties of the Office are institution-wide, and positioning the IR office directly under the VP for Academic Affairs (AA) allows a view of the problems and information needs of all levels of the institution.
>
> ***
>
> Reporting to the Vice President of Academic Affairs is most desirable if the effectiveness of the Office is to be maximized.

Id. ¶ 42.

In this letter, the plaintiff expressed her concerns about the OIR being placed within the IT/IS Division and stated that she believed that the OIR continuing to report to the Vice-President for Academic Affairs would be a "better setup." *Id*. ¶ 43. Both Wood and Pattenaude understood the plaintiff's letter to mean that she did not want to be placed within the new IT Division and, in accordance with her request and

the recommendation of Executive Alliance, the OIR remained within the Division of Academic Affairs, reporting to the Provost, and was not placed within the proposed IT Division. *Id*. ¶ 44.[33]

Sometime before July 21, 2004, Pattenaude told Wells that it was a "given" that the OIR would not go into the new IT Division. Plaintiff's Additional SMF ¶ 183; Memorandum dated July 21, 2004 from William W. Wells, Jr. to Richard L. Pattenaude, Exh. 9 to Bals Decl.[34] On or about October 27, 2004 the IT Workgroup issued its final report and recommendation ("IT Workgroup Report") to Pattenaude. Plaintiff's Additional SMF ¶ 184; Defendant's Reply SMF ¶ 184. The IT Workgroup Report proposed the creation, *inter alia*, of a unit named "Information Reporting" under the ambit of the new IT Division. Plaintiff's Additional SMF ¶ 185; IT Workgroup Report, Exh. 10 to Bals Decl., at 2.[35]

Patricia Davis, a USM employee, was named the Director of Information Reporting, an office within the IT Division. Defendant's SMF ¶ 63; Plaintiff's Opposing SMF ¶ 63. Davis's Office of Information Reporting captured and managed electronic data regarding grades, enrollment trends and retention and has performed those tasks under other names. *Id*. ¶ 65. The IT Division is a new division. Plaintiff's Additional SMF ¶ 189; Defendant's Reply SMF ¶ 189. It is not part of the Division of Academic Affairs and does not fall within that division's budget. *Id*. ¶ 190.

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[33] The plaintiff qualifies this statement, *see* Plaintiff's Opposing SMF ¶ 44, asserting that until her termination notification in September 2004, she was operating under the assumption that she and her office (possibly with a new name) would be transferred to the new IT Division, consistent with Wood's statements to her during their March meeting, *see* Johnson Aff. ¶ 23. She asserts that neither Pattenaude, Wood nor anyone else at USM ever told her that USM had decided to honor her request and keep the OIR outside the umbrella of the IT Division or that if they honored her request, the OIR would be eliminated and she would be fired. *See id*. ¶ 26. She adds that had she been confronted with that choice, she would have agreed wholeheartedly to move to the IT Division. *See id*.

[34] The defendant's objection to this statement on the basis that it is not supported by the citations given, *see* Defendant's Reply SMF ¶ 183, is overruled.

[35] The defendant's objection on the basis of inclusion of an unauthenticated last page in the IT Workgroup Report, *see* Defendant's Reply SMF ¶ 185, is overruled. The plaintiff does not rely on that page to support this statement.

Prior to the time that the OIR was eliminated, Davis trained the plaintiff so that the plaintiff, along with others, could access data, thereby sparing Davis from having to write new programs every time somebody asked for data. Defendant's SMF ¶ 67; Plaintiff's Opposing SMF ¶ 67. Prior to being trained, the plaintiff interacted with Davis to acquire student data that Davis managed. *Id*. ¶ 68. The plaintiff does not know what the qualifications are for the Director of Information Reporting, and although she does not know if Davis has created any reports yet, she believes that Davis does work similar to what the OIR did before it was eliminated. *Id*. ¶ 69.[36]

The IT Workgroup Report described Information Reporting as follows:

> This unit will be responsible for the data reporting and analysis USM is required to provide for its various departments and to outside agencies. The members of this unit are subject matter experts who understand the data and know how to review and present it. The people in this unit will be brought together from several offices that are now attempting to provide this function.

Plaintiff's Additional SMF ¶ 185; IT Workgroup Report at 2. According to the Director of the Information Reporting unit, Davis, the description of that unit contained in the IT Workgroup Report accurately reflects what the unit has done since its formation. Plaintiff's Additional SMF ¶ 187; Defendant's Reply SMF ¶ 187. A flow chart on the USM web site describes the functions of Information Reporting as "[r]eport writing, data analysis, data administration, end user communications." *Id*. ¶ 188.

USM has been faced with a series of financial challenges over the past few years. Defendant's SMF ¶ 72; Plaintiff's Opposing SMF ¶ 72. It has experienced dramatic increases in costs, particularly in the area of health-care costs, an increase in competition, with far fewer high-school graduates anticipated in the years ahead, and decreasing state financial support. *Id*. It faces the specter of ongoing deficits. *Id*.

[36] The plaintiff qualifies this statement, denying that she does not currently know the qualifications for the position of (*continued on next page*)

Since 2002-03, USM has had to deal with dramatic reductions in state financial support. *Id.* ¶ 73. In the 2002-03 fiscal year, as a result of a legislative budget reduction of $3,585,437 for the University System, USM had to make approximately $400,000 in cuts to its budget. *Id.* ¶ 74. The Division of Academic Affairs shouldered the burden of 63 percent of that amount, and as a result, Wood had to cut $253,320 from his Academic Affairs budget. *Id.*[37] In 2003-04, USM again faced budget reductions, and the Division of Academic Affairs had to make cuts of $485,000 to its budget. *Id.* ¶ 75.[38] At the time, Wood believed that the budget-reduction requirements could be offset by an increase in revenue and increased efficiencies. *Id.* Wood learned in the spring of 2004 that for the third year in a row, he had to cut his budget in order to balance it, and that he would have to make budget cuts the following year. *Id.* ¶ 76. He was responsible for shaving approximately $450,000 from the 2004-05 budget of the Division of Academic Affairs. *Id.*

USM has eight academic units: (i) the College of Arts and Sciences, (ii) the School of Applied Sciences, Engineering, and Technology, (iii) the School of Business, (iv) the College of Education and Human Development, (v) the College of Nursing and Health Professions, (vi) the Lewiston-Auburn College, (vii) the Edmund S. Muskie School of Public Service, and (viii) the University of Maine School of Law. *Id.* ¶ 77. Wood had been systematically eliminating faculty positions through retirement and attrition, and he had been using one-time money for a couple of years to cover his base budget cuts. *Id.* ¶ 78. One of Wood's budget cuts through attrition occurred in the OIR, when a research assistant in that office resigned

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Director of Information Reporting. *See* Plaintiff's Opposing SMF ¶ 69; Johnson Aff. ¶ 28.

[37] The plaintiff qualifies this statement, denying that Wood "had" to cut $253,320 from his budget. *See* Plaintiff's Opposing SMF ¶ 74. She points out, *inter alia*, that USM Chief Financial Officer Samuel Andrews testified that if departments failed to meet their budget projections, "[t]here are no rules that dictate penalties or otherwise." *Id.*; Deposition of Samuel G. Andrews ("Andrews Dep."), Tab 5 to Defendant's SMF, at 18.

[38] The plaintiff qualifies this statement, denying that Wood "had" to cut his budget. *See* Plaintiff's Opposing SMF ¶ 75; Andrews Dep. at 18.

in the fall of 2002. *Id*. ¶ 79. Due to budget reduction necessities, Wood chose not to replace the research assistant, a decision that had nothing to do with the plaintiff. *Id*.[39]

Wood was unable to effect required budget reductions through attrition and could not offset the reductions through increased revenue and/or efficiencies, which had not been realized in the prior year. *Id*. ¶ 81.[40] Wood, like the other vice-presidents at USM, is given discretion to make the necessary budget reductions in his area of responsibility. *Id*. ¶ 82. As the President of USM, Pattenaude relies on the professional judgment of the vice-presidents of the various divisions of USM, especially in the area of their management of budgets. *Id*. While Pattenaude discusses the vice-presidents' plans for effecting necessary budget cuts, he does not generally interfere with those decisions unless he has a reason to disagree strongly. *Id*. ¶ 84.

Wood decided to cut his budget in 2004 by finding a place where he had functions that were not directly related to instruction and the instructional mission of the University System and the Division of Academic Affairs. *Id*. ¶ 85. He looked at his budget and reviewed the offices that reported to him to determine if there were functions that would not be needed on an ongoing basis, and he talked with deans about faculty or staff who were expected to retire or resign. *Id*. ¶ 86. In the end, he "believed that the Office of Institutional Research was the office that was the one that [he] could eliminate to do a base-budget cut with the least impact on Academic Affairs." *Id*. ¶ 87.[41]

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[39] The plaintiff, in effect, qualifies this statement, asserting that after she appealed the decision not to replace the research assistant, Wood agreed that the OIR would retain an amount equal to half of the research assistant's salary to hire graduate assistants, but he never transferred the agreed-upon funds back to the OIR budget. *See* Plaintiff's Opposing SMF ¶ 79; Deposition of Judith L. Johnson ("Johnson Dep."), Tab 11 to Defendant's SMF, at 193-94.

[40] The plaintiff purports to qualify this statement; however, her qualification that she admits Wood could not make the same cuts through the same efficiencies achieved the prior year but denies that there were no other ways to increase revenues or efficiencies is conclusory and argumentative and is on those bases disregarded. *See* Plaintiff's Opposing SMF ¶ 81.

[41] The plaintiff purports to qualify this statement; however, her qualification that she has advanced compelling evidence (*continued on next page*)

Beginning in 2003, Pattenaude met with Wood several times about how he would reduce his budget by the required amount of $450,000, and during those conversations Wood raised the possibility of eliminating the OIR and the two positions associated with that office. *Id*. ¶ 88.[42] In September 2004, Wood decided to eliminate the OIR, which was directed by the plaintiff. *Id*. ¶ 89.[43] The plaintiff had one employee, Kimberly Spencer, whom she supervised. *Id*. Wood decided to eliminate the OIR after the other schools and colleges that he oversees had already given up faculty lines or staff lines and had already had their budgets cut. *Id*. ¶ 90.[44] Wood informed Pattenaude of his decision to eliminate the OIR, and Pattenaude left the decision to Wood. *Id*. ¶ 91.[45] The decision to eliminate the OIR had nothing to do with the creation of the IT Division. *Id*. ¶ 92.

As the recipient of the work that had been done by the OIR, Wood determined that he could do without institutional research because it was "the least-useful function that [he] had to deal with that [he] had access to[.]" *Id*. ¶ 93.[46] Between 2001 and 2004 the OIR, under the direction of the plaintiff, completed twenty written reports. *Id*. ¶ 94. During that same period, the OIR performed numerous studies and projects at the request of various people and departments at USM that did not result in actual published reports. Plaintiff's Additional SMF ¶ 204; Defendant's Reply SMF ¶ 204.[47] During that time period, the

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of pretext is in the nature of a legal argument and is on that basis disregarded. *See* Plaintiff's Opposing SMF ¶ 87.

[42] My recitation incorporates the plaintiff's qualification.

[43] The plaintiff qualifies this statement, asserting that while Wood testified that the decision was made in September 2004, Pattenaude testified that it was made in the summer of 2004. *See* Plaintiff's Opposing SMF ¶ 89; Deposition of Richard L. Pattenaude ("Pattenaude Dep."), Tab 13 to Defendant's SMF, at 53.

[44] The plaintiff purports to qualify this statement; however, her qualification that she denies that the elimination of the OIR was the only other way in which Wood could cut Academic Affairs costs is conclusory and argumentative and is on those bases disregarded. *See* Plaintiff's Opposing SMF ¶ 90.

[45] The plaintiff qualifies this statement, asserting that the decision was made after multiple consultations with Pattenaude. *See* Plaintiff's Opposing SMF ¶ 91; Pattenaude Dep. at 12-13; Affidavit of Joseph S. Wood ("First Wood Aff."), Tab 4 to Defendant's SMF, ¶ 20.

[46] The plaintiff purports to qualify this statement; however, her qualification that she has advanced compelling evidence of pretext is in the nature of a legal argument and is on that basis disregarded. *See* Plaintiff's Opposing SMF ¶ 93.

[47] The defendant's objection to use of the word "numerous" on the ground of its conclusory nature, *see* Defendant's

(*continued on next page*)

OIR's budget was $129,059 in 2001-02, with actual expenditures of $127,032; $108,129 in 2002-03, with actual expenditures of $110,006; $104,326 in 2003-04, with actual expenditures of $144,147; and $149,559 in 2004-05, with actual expenditures of $158,800. Defendant's SMF ¶ 95; Plaintiff's Opposing SMF ¶ 95.[48] The "Current Budget" and "Expenditure" figures for the OIR for fiscal years 2003-04 and 2004-05 are significantly higher than in preceding fiscal years because (i) those two fiscal years included benefits paid to OIR employees, while figures for the earlier years did not, and (ii) the figures for 2004-05 included two months of severance pay and accrued vacation paid to the plaintiff following her termination. Plaintiff's Additional SMF ¶ 205; Defendant's Reply SMF ¶ 205.

Wood was able to save approximately $150,000 of permanent base budget by eliminating the OIR, and he had already cut approximately $700,000 or $800,000 out of other offices. Defendant's SMF ¶ 96; Plaintiff's Opposing SMF ¶ 96. The base budget for the Division of Academic Affairs for the 2004-05 fiscal year was approximately $53 million. Plaintiff's Additional ¶ 224; Defendant's Reply SMF ¶ 224. The $150,000 in budget savings supposedly realized by the elimination of the OIR represented less than 0.3 percent of the Division of Academic Affairs' budget for that fiscal year. *Id*. ¶ 225.

At the time Wood made his decision to eliminate the OIR, he was unaware that the plaintiff had made a claim of discrimination in 1997. *Id*. ¶ 97. Wood, who came to USM in 2000, was not there when the plaintiff made her claim in 1997, and he did not base his decision on the filing of the 1997 Action. *Id*. ¶ 98.[49]

Reply SMF ¶ 204, is overruled.

[48] The plaintiff qualifies this statement, asserting that the figures described as representing the OIR's budget are properly defined as its "actual budget." Plaintiff's Opposing SMF ¶ 95; Andrews Dep. Exh. 2, Tab 17 to Defendant's SMF.

[49] The plaintiff purports to qualify this statement; however, her qualification that she has advanced compelling evidence of pretext is in the nature of a legal argument and is on that basis disregarded. *See* Plaintiff's Opposing SMF ¶ 98.

On September 28, 2004, Dan Rabata, Employment Services Manager for USM, wrote an e-mail to the plaintiff stating: "I need to meet with you before the end of this week on a confidential matter. Since the meeting involves a matter pertaining to Kimberly Spencer, we should meet away from your office." *Id*. ¶ 99. Rabata did not inform the plaintiff in his e-mail that she was going to be laid off because he did not believe it prudent to deliver such news via e-mail. *Id*. ¶ 100. On September 30, 2004, Rabata met with the plaintiff and provided her a copy of a letter from Wood notifying her of her layoff. *Id*. ¶ 101. During that meeting, Rabata conferred with the plaintiff about how she thought Spencer should be notified about the decision to eliminate the OIR and, hence, Spencer's position. *Id*. ¶ 102. The two decided that Rabata would accompany the plaintiff back to the OIR office to inform Spencer. *Id*. The plaintiff voiced her concern about the impact of layoff on Spencer. Plaintiff's Additional SMF ¶ 210; Defendant's Reply SMF ¶ 210. Rabata responded that there were many possibilities at USM for Spencer because of the high turnover rate for administrative assistants. *Id*. He told the plaintiff that Wood had told him that Wood would have Spencer work in the Provost's office because Tina, Wood's assistant, was leaving at the end of the year. *Id*. When the plaintiff discussed this possibility with Spencer, Spencer said she did not think she wanted to work for Wood. *Id*.

Until her termination in September 2004, the plaintiff was operating under the assumption that she and her office (possibly with a new name) would be transferred to the new IT Division, consistent with Wood's statements to her during their March meeting. Plaintiff's Additional SMF ¶ 201; Defendant's Reply SMF ¶ 201. Indeed, until she was terminated, the plaintiff did not even know that USM had decided to "honor her request" and keep the OIR outside the umbrella of the IT Division. *Id*. Wood admits that the plaintiff had no idea that her termination and the dissolution of the OIR were coming until she was notified by Rabata in September 2004. *Id*. ¶ 202.

In his letter dated September 30, 2004, Wood informed the plaintiff that her position as Director of the OIR would be eliminated effective March 31, 2005 for "program reasons." Defendant's SMF ¶ 104; Plaintiff's Opposing SMF ¶ 104. The termination letter did not indicate that the reason she was being terminated was budgetary. Plaintiff's Additional SMF ¶ 208; Letter dated September 30, 2004 from Joseph S. Wood to Judith L. Johnson, Exh. 20 to Bals Decl.[50] On October 12, 2004, Wood responded to an e-mail from the plaintiff dated October 8, 2004 in which she asked for clarification of the reasons for elimination of the OIR. Defendant's SMF ¶ 105; Plaintiff's Opposing SMF ¶ 105. Wood wrote:

> The reason is financial. I cannot support all of the programs in Academic Affairs on the present budget. In order to meet rescissions/State appropriation reductions – while ensuring adequate course coverage with full-time tenure-track faculty members, including replacements as required for resignations and retirements, I have floated $450,000.00 in accumulated debt in the overall Academic Affairs budget. (I had hoped I might have gotten some early retirements in programs where I would not need to find replacements, but it did not happen as I had hoped.) I have to reduce my base budget by this amount over the next year or so, while using any discretionary dollars I may get from, for instance, ITV to cover this debt each year until it was paid off by base budget reduction. In short, I have squeezed as much out of faculty lines as I believe I can, and we are seeing an impact on degree programs, e.g. COM and MES, Nursing, Teacher Education, and the delay in starting the PsyD. So I have had to begin to cannibalize the non-academic portions of the Division of Academic Affairs. At the same time, the UMS has been increasing its institutional research functionality, making your office, frankly, somewhat redundant.

Id. ¶ 106. In response to the plaintiff's question about how institutional research functions were going to be handled and who would be doing the work, Wood wrote: "I expect to be able to get critical reports as necessary from the System Office, given its increased functionality. I do not know how we will do the annual graduating senior survey at this time. We will contract for other surveys as necessary, in other words privatize the work." *Id*. ¶ 107. Wood concluded: "I am sorry I had to do this, but I had to act. I am

[50] The defendant denies this statement, *see* Defendant's Reply SMF ¶ 208; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.

hopeful that with the considerable lead time provided by the six months' notice and the eight months of severance you have accumulated, and somewhat less for Kim, that we can find you and Kim interesting and challenging positions soon." *Id*. ¶ 108. The first time that Wood claimed the OIR was eliminated for budgetary reasons was in his October 12, 2004 e-mail responding to the plaintiff's inquiry as to what "program reasons" meant. Plaintiff's Additional SMF ¶ 209; Johnson Aff. ¶ 26; E-mail dated October 12, 2004 from Joseph Wood to Judith Johnson, Exh. 21 to Bals Decl.[51]

Although the decision to eliminate the OIR was not Pattenaude's, he agreed with it. Defendant's SMF ¶ 109; Plaintiff's Opposing SMF ¶ 109.[52] Wood was concerned about cutting the OIR because he does not like to cut anything and because he would "lose some functionality." *Id*. ¶ 110. Unfortunately, annual budget cuts are a reality at USM. *Id*. ¶ 111. Wood believed that USM's instructional mission was of greater importance than maintaining institutional research, "as important as that may be." *Id*. ¶ 112. Pattenaude agreed generally, and continues to agree, with Wood's conclusion that the OIR was in large part a redundant office given the institutional-research capacity at the University System level. *Id*. ¶ 113.[53] The University System increased the capacity for institutional research systemwide by creating the University System-level Office of Policy and Planning Analysis ("OPPA") in 2003. *Id*. ¶ 114.[54] As a member of the University System Chancellor's President's Council and also as the President of USM, Pattenaude was

[51] The defendant's objection on the ground that this statement is unsupported by the record references provided, *see* Defendant's Reply SMF ¶ 209, is overruled. The defendant alternatively qualifies the statement, asserting that Rabata, who helped draft the termination letter, believed that the term "program reasons" encompassed "financial matters, budget pressures, [and] relative priorities of one program versus another[.]" *Id*.; Deposition of F. Daniel Rabata, Tab 14 to Defendant's SMF, at 49-50.

[52] The plaintiff qualifies this statement, asserting that, although the decision to eliminate the OIR was ultimately made by Wood, he did not reach it without first consulting with Pattenaude and Andrews. Plaintiff's Opposing SMF ¶ 109; Pattenaude Dep. at 14-15, 27; First Wood Aff. ¶ 20.

[53] The plaintiff purports to qualify this statement; however, her qualification that she has advanced compelling evidence of pretext is in the nature of a legal argument and is on that basis disregarded. *See* Plaintiff's Opposing SMF ¶ 113.

[54] The plaintiff qualifies this statement, asserting that USM denies having used the OPPA for USM-specific research. *See*

(*continued on next page*)

familiar with the capabilities of James Breece, Director of the OPPA. *Id.* ¶ 115. Institutional-research needs at USM can be handled by OPPA, whose services are not charged to USM. *Id.* ¶ 116.[55] The OPPA's institutional-research work encompasses analysis that is applicable to the entire University System, and the reports also contain information about the individual universities, including USM. *Id.* ¶ 146.

Only Pattenaude and Wood played any role in the actual decision to eliminate the OIR. *Id.* ¶ 120. At no time did anybody at USM, or anywhere else, indicate to Wood in any way that the OIR should be eliminated and the plaintiff's position be eliminated based on her age, her gender, the fact that she filed a complaint in 1997, or her personality. *Id.*[56] Pattenaude has never heard anybody, including Wood, indicate in any way that the OIR was eliminated because of the plaintiff's gender, age or personality. *Id.* ¶ 121. From Pattenaude's perspective, and from all that was communicated to him, the OIR was eliminated for budgetary reasons. *Id.*[57]

On January 21, 2005 Pattenaude sent a letter to all USM employees discussing the formation of the IT Division effective January 18, 2005. Plaintiff's Additional SMF ¶ 200; Defendant's Reply SMF ¶ 200. In that letter, Pattenaude stated: "As this is a major reorganization, several positions and functions require movement from one division to another, including changes in reporting lines within units, and in several cases, physical relocation for a few individuals. I want to emphasize, however, that while jobs are being reassigned, no job losses are expected." *Id.*

Plaintiff's Opposing SMF ¶ 114; Affidavit of Richard L. Pattenaude ("First Pattenaude Aff."), Tab 2 to Defendant's SMF, ¶ 13; Wood Dep. at 134-35.

[55] The plaintiff qualifies this statement, denying that research is being done at the University System level specifically for USM. *See* Plaintiff's Opposing SMF ¶ 116; First Pattenaude Aff. ¶ 13; Wood Dep. at 134-35.

[56] The plaintiff purports to qualify this statement; however, her qualification that she has advanced compelling evidence of pretext is in the nature of a legal argument and is on that basis disregarded. *See* Plaintiff's Opposing SMF ¶ 120.

[57] The plaintiff purports to qualify this statement; however, her qualification that she has advanced compelling evidence of pretext is in the nature of a legal argument and is on that basis disregarded. *See* Plaintiff's Opposing SMF ¶ 122.

The plaintiff alleges that during a lunch meeting in January 2005, she was told by Richard Barnes that she was seen as a "bitch" or "bitchy" and as a "troublemaker" because of her 1997 discrimination complaint, and that USM was going to find a way to get rid of her. Defendant's SMF ¶ 123; Plaintiff's Opposing SMF ¶ 123. When Barnes spoke with Johnson in January 2005, he was speaking to her as her friend and not in any official capacity as an employee of USM. *Id*. ¶ 124.[58]

Before Barnes spoke with the plaintiff, he spoke with Rosa Redonnett, Vice-President of Enrollment Management, and asked her if she knew why the OIR was eliminated, why Wood had not met personally with the plaintiff to deliver the news and whether the OIR had been eliminated because of the plaintiff's past issues with the administration. *Id*. ¶ 125. Redonnett told Barnes that, as far as she knew, the OIR had been eliminated because it had been determined to be redundant. *Id*. Barnes had not been asked by anyone at USM to talk with the plaintiff, and he was not an authorized representative of USM. *Id*. ¶ 126. Barnes has never spoken to either Wood or Pattenaude about the elimination of the OIR and of the plaintiff's position. *Id*.

After the decision was made to terminate the plaintiff, the USM human resources department was careful to designate the OIR as the appropriate "layoff unit" so as not to trigger unintentional "bumping rights" that would enable the plaintiff, as a union member, to take the job of another USM employee with less seniority. Plaintiff's Additional SMF ¶ 206; Defendant's Reply SMF ¶ 206. Pursuant to the plaintiff's union contract, she could only be terminated if her department was eliminated for *bona fide* financial or program reasons. Plaintiff's Additional SMF ¶ 207; Agreement between University of Maine System and

[58] I omit the defendant's further statement that Barnes did not provide the plaintiff with any specific basis for his statements, *see* Defendant's SMF ¶ 124, which she denies, *see* Plaintiff's Opposing SMF ¶ 124; Johnson Dep. at 177, 182.

Universities of Maine Professional Staff Association, Professional and Administrative Unit ("Union Contract"), Exh. 19 to Bals Decl., Art. 9(A).[59]

As a member of a union at USM, the plaintiff was entitled to file a grievance regarding the elimination of the OIR, and she did so. Defendant's SMF ¶ 129; Plaintiff's Opposing SMF ¶ 129. Rabata was the officially designated representative of USM at the plaintiff's Step 2 grievance hearing. Plaintiff's Additional SMF ¶ 216; Defendant's Reply SMF ¶ 216. Mark Kamen was the officially designated representative of the University System and the Chancellor's Office at the plaintiff's Step 3 grievance hearing. *Id*. ¶ 217.[60] The plaintiff claims that Kamen told her during a Step 3 hearing that hers was a "test" case and that USM was going to "get rid of high paid employees." Defendant's SMF ¶ 131; Plaintiff's Opposing SMF ¶ 131. The plaintiff interpreted Kamen's statement to mean that USM wanted to get rid of older employees, but Kamen did not actually say that. *Id*. After the Step 3 grievance hearing, the plaintiff withdrew her grievance because she had lost faith in the grievance process and wanted to pursue her remedies in court. Plaintiff's Additional SMF ¶ 218; Defendant's Reply SMF ¶ 218.

Before Wood made his decision and at the time of his decision to eliminate the OIR, he had not spoken to Kamen for any purpose regarding the plaintiff and did not speak with Rabata except to ask him to prepare the termination letter and to accompany him to meet with the plaintiff. Defendant's SMF ¶ 118; Plaintiff's Opposing SMF ¶ 118. Neither Kamen nor Rabata played any role in making the decision to eliminate the OIR. *Id*.

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[59] The defendant's objection on the basis that this statement is not supported by the record citation given, *see* Defendant's Reply SMF ¶ 207, is overruled. The defendant alternatively qualifies the statement, asserting that it defines "layoff" as "the discontinuance of a unit member with a continuing appointment at any time for bona fide financial or program reasons" and states, "The University shall designate the layoff unit within which layoff may occur and the positions within said layoff unit which will be eliminated." *Id*.; Union Contract, Arts. 9(A)-(B).

[60] Kamen's first name is set forth in paragraph 118 of the Defendant's SMF.

On or about March 17, 2005 the plaintiff filed a Charge of Discrimination with the MHRC. *Id*. ¶ 136. In that Charge of Discrimination, she alleged that USM had discriminated against her on the basis of her age and her gender and further retaliated against her on the basis of the 1997 Action. *Id*. The only protected activity with respect to which the plaintiff claims retaliation is the 1997 Action. *Id*. ¶ 139. The plaintiff's termination became effective on March 31, 2005. *Id*. ¶ 137.

Neither the plaintiff nor Spencer was employed again by USM after the OIR was eliminated. *Id*. ¶ 138. The plaintiff's union contract entitled her to recall rights for the same, or substantially similar, positions that might become vacant during the two years following her termination. Plaintiff's Additional SMF ¶ 211; Defendant's Reply SMF ¶ 211. The plaintiff asked to be placed on the recall list. *Id*. ¶ 212. To date, she has received no contact from USM regarding potential job openings. Plaintiff's Additional SMF ¶ 213; Johnson Aff. ¶ 36.[61] Following the plaintiff's termination, the State of Maine sent USM a Request for Separation/Wage Information form regarding the plaintiff; USM filled it out and returned it to the state to allow the state to calculate the plaintiff's unemployment benefits. Plaintiff's Additional SMF ¶ 214; Defendant's Reply SMF ¶ 214. In response to the question on the separation form, "Will [the plaintiff] be recalled to work," USM checked the box labeled "No," despite also having the options of checking "Yes" or "Unknown." *Id*. ¶ 215.

Between 2000 and June 2005, no USM employees other than the plaintiff and Spencer were terminated for "program" or budgetary reasons. *Id*. ¶ 147.[62] It is unusual for USM departments or offices

[61] The defendant denies this statement, *see* Defendant's Reply SMF ¶ 213; however, I view the facts in the light most favorable to the plaintiff, as nonmovant.

[62] The defendant qualifies this statement, asserting that when Pattenaude was asked at deposition whether any professional staff member at USM had lost a position for budgetary reasons since 2000, he identified Wanda Whitten, former editor of the Southern Maine Review, as having lost her position due to budgetary reasons when Wood decided to eliminate the journal. Defendant's Reply SMF ¶ 147; Pattenaude Dep. at 70-71.

to be completely eliminated; typically they are merged, or their titles are changed. Plaintiff's Additional SMF ¶ 148; King Dep. at 23.[63]

On its web site, the Office of Academic Assessment describes the services it provides as follows:

? Assists internal departments with program assessment studies;
? Assists faculty with course assessment projects
? Conducts institutional assessment studies

Plaintiff's Additional SMF ¶ 176; Defendant's Reply SMF ¶ 176. Academic assessment, as performed by King and the Office of Academic Assessment, and institutional research as performed by the plaintiff, the TAC and then the OIR, "definitely overlap," and some people would say that they are "the exact same thing." *Id*. ¶ 177.[64]

In January 2006 USM issued a Fifth Year Interim Report for NEASC ("NEASC Interim Report"), intended to provide NEASC an update on USM's progress in resolving various issues identified in a 2001 NEASC report. *Id*. ¶ 230. The NEASC Interim Report reads, in part:

> The visiting team report commented on the need to improve Institutional Research. USM's strategic realignment of IT as well as the creation of the UMS Office of Planning and Policy Analysis (which is responsible for research, analysis and recommendations on issues) and the reorganization of Academic Assessment within Academic Affairs has enabled us to make advancements in this area. When these are combined with the powerful new PeopleSoft information tool, we will be able to use the System Office for the needed sophisticated analysis on important issues. Locally, we utilize the Information Reporting Department to provide the institutional data needed for regular information reporting functions. The capacity building that is taking place within the Office of Academic Assessment is intended to provide the important link between institutional data and student

[63] The defendant's objection to this statement on the basis that it is not supported by the record citation provided, *see* Defendant's Reply SMF ¶ 148, is overruled.

[64] The defendant qualifies this statement, asserting, in part, that King testified that, to her knowledge, there was no one at USM doing the institutional research that the plaintiff did as Director of the OIR, that the type of institutional research King discussed in her deposition did not refer to the institutional research done by the plaintiff and the OIR, that King's work as the Director of Academic Assessment was no different from what she did before the plaintiff left USM, and that she did not consider herself to be doing institutional research as the Director of Academic Assessment. Defendant's Reply SMF ¶ 177; King Dep. at 29-31.

> learning to inform improvement, decision making, and information sharing with internal and external constituencies.

Id. ¶ 231.[65] The NEASC Interim Report goes on to state: "The Office of Academic Assessment will work collaboratively with the new Department of Information Reporting in order to integrate institutional data with assessment data in order to advance program quality and innovation in teaching and learning among all segments of the University." *Id*. ¶ 232.

Since the OIR was dissolved in March 2005, USM has not asked the OPPA for any institutional research or reports related specifically to USM (as opposed to the University System as a whole). Plaintiff's Additional SMF ¶ 233; First Pattenaude Aff. ¶ 13; Wood Dep. at 134-35.[66] During the entire existence of the OIR, virtually all of its institutional research and reports related specifically to USM (as opposed to the University System as a whole) and/or were requested by USM faculty, staff and administration. Plaintiff's Additional SMF ¶ 234; Defendant's Reply SMF ¶ 234.

According to King, the Director of Academic Assessment, institutional research is being done at several USM offices, including the Office of Sponsored Research and the Management Information Office. Plaintiff's Additional SMF ¶ 235; King Dep. at 26-27.[67] King also stated, in response to a question

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[65] My recitation incorporates, in part, the defendant's qualification.

[66] I omit the plaintiff's representation that this state of affairs is "[c]ontrary to the suggestions in the NEASC Interim Report," Plaintiff's Additional SMF ¶ 233, sustaining the defendant's objection on the ground that the phrase is argumentative, *see* Defendant's Reply SMF ¶ 233. The defendant qualifies the statement, asserting that the work of the OPPA generally encompasses the entire University System, with certain portions of the reports being specific to the seven different universities within the University System. *Id*.; First Pattenaude Aff. ¶¶ 12-13.

[67] The defendant's objection on the ground that this statement is not supported by the citations given, *see* Defendant's Reply SMF ¶ 235, is overruled. The defendant alternatively qualifies the statement, asserting that (i) King testified that if she were approached with an institutional-research question, that is not something she generally does, (ii) when King was testifying regarding the Office of Sponsored Research and the Management Information Office, she was not referring to the kind of research done by the plaintiff in the OIR, and (iii) she does not know that there is any institutional research being done on the USM campus as the plaintiff did it in the OIR. *Id*.; King Dep. at 29-30.

concerning institutional research: "I believe almost every office does a little of their own [institutional] research from my experience there." Plaintiff's Additional SMF ¶ 236; Defendant's Reply SMF ¶ 236.

At the time of the plaintiff's termination she was fifty-eight years old, Davis was thirty-eight years old and King was less than fifty years old. *Id*. ¶¶ 238-39. During the course of her employment with USM, the plaintiff was never subjected to any disciplinary action and always received positive job reviews. *Id*. ¶ 240.[68]

On or about January 1, 2005 Susan Campbell left her position as the Executive Director of DAAR and was promoted to Associate Vice-President for Academic Affairs. *Id*. ¶ 222.[69] Aside from now being placed on Wood's budget, Campbell received a raise from $72,090 to $82,200.04. *Id*. ¶ 223.[70] USM hired thirty-two new faculty for the 2005-06 school year. *Id*. ¶ 227.[71]

III. Analysis

In her amended complaint, the plaintiff asserts claims for (i) age discrimination, in violation of 29 U.S.C. § 621 *et seq*. (Count I) and 5 M.R.S.A. § 4572(1)(A) (Count II), (ii) gender discrimination, in

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[68] I omit the plaintiff's further assertion that, to the best of her knowledge, she met or exceeded all legitimate job expectations, *see* Plaintiff's Additional SMF ¶ 240, sustaining the defendant's objection that it is not based on personal knowledge, *see* Defendant's Reply SMF ¶ 240.

[69] I omit the plaintiff's further statement that the position was created for Campbell, *see* Plaintiff's Additional SMF ¶ 222, sustaining the defendant's objection on the basis of lack of personal knowledge, *see* Defendant's Reply SMF ¶ 222.

[70] The defendant qualifies this statement, asserting that (i) when Campbell was reclassified to Associate Vice-President for Academic Affairs, the money to cover her salary came from the budget for the Division of Enrollment Management, to which she had previously been assigned, (ii) her promotion did not cause an increase in expenditure for the Division of Academic Affairs that was not covered by a transfer of money from the Division of Enrollment Management, and (iii) Wood hired a new assistant after his assistant retired, at a savings of approximately $12,000, allowing him to provide Campbell with a raise commensurate with her reclassification. Defendant's Reply SMF ¶ 223; Second Affidavit of Joseph S. Wood ("Second Wood Aff."), attached to Defendant's Reply SMF, ¶¶ 6-8.

[71] The defendant qualifies this statement, asserting that (i) the thirty-three new appointments represented a six-person net increase in the number of full-time faculty members, (ii) five of the six net new appointments represented new permanent appointments to tenure-track positions in four high student-demand areas and in a newly approved doctoral program, based on real or projected enrollment increases, (iii) the cost of the six net new appointments is expected to be matched by an increase in tuition dollars in those programs, and the appointments were made to meet student demand, (iv) there were twenty-four replacement appointments, in which vacant positions were filled, and (v) there were three new appointments to tenure-track positions for appointees who had in the previous year held fixed-length positions. Defendant's Reply (*continued on next page*)

violation of 42 U.S.C. § 2000e-2(a)(1) (Count III) and 5 M.R.S.A. § 4572(1)(A) (Count IV), (iii) retaliation, in violation of 42 U.S.C. § 2000e-3(a) (Count V), 5 M.R.S.A. § 4633(1) and (2) (Count VI) and the Whistleblower Act, 26 M.R.S.A. § 831 *et seq*. (Count VII), and (iv) negligent infliction of emotional distress ("NIED") (Count VIII). *See* First Amended Complaint and Demand for Jury Trial ("Amended Complaint") (Docket No. 3) ¶¶ 29-60.

The defendant seeks summary judgment with respect to the entirety of the Amended Complaint on six bases: that (i) the plaintiff's federal age-discrimination claim is barred by Eleventh Amendment immunity, (ii) her suit is untimely with respect to all but two assertedly retaliatory acts, (iii) she fails to establish a *prima facie* case of age or gender discrimination or retaliation, (iv) she cannot demonstrate that budgetary and programmatic reasons given for the elimination of the OIR were pretexts for age or gender discrimination or for retaliation, (v) to the extent she seeks to assert an unequal-pay claim, she is barred from so doing by the statute of limitations and by her failure to assert such a claim previously, and (vi) her NIED claim is not cognizable because she was an employee of USM. *See* Defendant's S/J Motion at 1.

The plaintiff concedes that (i) her federal age-discrimination claim (Count I) is barred by Eleventh Amendment immunity, and (ii) she cannot press her NIED claim (Count VIII); accordingly, she does not challenge entry of summary judgment as to those two counts. *See* Plaintiff's S/J Opposition at 2. She also clarifies that she seeks relief only with respect to two discrete allegedly retaliatory incidents: her termination and the fact that her pay fell behind that of comparable male USM employees. *See id*. at 4. She explains that other adverse events described by the defendant on page 3 of its motion (the charging of the $10,000 settlement to the TAC budget, the grant of a three-month rather than six-month leave to write a book, the

SMF ¶ 227; Second Wood Aff. ¶¶ 11-14.

grant of a two-week rather than three-month extension of that leave, the denial of her request to attend the Provost's staff meetings, the denial of her request to fill a vacant research-assistant slot, and two interim moves of the OIR offices, *see* Defendant's S/J Motion at 3, "are simply part of the causal link between the 1997 Action and the pay disparity and [her] firing[,]" *see* Plaintiff's S/J Opposition at 4.[72]

In addition to expressly conceding the defendant's entitlement to summary judgment with respect to Counts I and VIII, the plaintiff implicitly concedes its entitlement to prevail with respect to Counts III and IV (her claims of gender discrimination) by failing to articulate any opposition to entry of summary judgment with respect thereto. *See generally id*.; *see also, e.g., Grenier v. Cyanamid Plastics, Inc*., 70 F.3d 667, 678 (1st Cir. 1995) ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.") (citations and internal quotation marks omitted); *Shapiro v. Haenn*, 222 F. Supp.2d 29, 44 (D. Me. 2002) (to survive summary judgment on certain count, "Plaintiff was required to inform the Court of the reasons, legal or factual, why summary judgment should not be entered.") (citation and internal quotation marks omitted). In any event, even assuming *arguendo* that she has not waived or conceded those claims, for reasons discussed below, I find the defendant entitled to summary judgment with respect to them on the merits.

The scope of the plaintiff's claims is narrowed not only by her concessions (explicit and implicit) and clarifications but also by my ruling, in the context of resolving the Motion To Exclude, that she is barred by virtue of failure to exhaust remedies from bringing an unequal-pay claim. Remaining on the table, thus, are

[72] In her amended complaint, the plaintiff had identified failure to offer her a job in the new Information Reporting unit of the IT Division as an adverse employment action for purposes of her age-discrimination claim, *see* Amended Complaint ¶ 32, and failure to offer her the position of CIO or a position in the new Information Reporting unit as adverse employment actions for purposes of her gender-discrimination and retaliation claims, *see id*. ¶¶ 41, 48. Inasmuch as she clarifies in her opposing brief that she seeks relief in the instant action only with respect to her termination and allegedly unequal pay, *see* Plaintiff's S/J Opposition at 4, and she does not otherwise refer to a failure to hire, *see generally id*., I (*continued on next page*)

her state-law claim of age discrimination (Count II) and her federal and state-law claims of retaliation (Counts V, VI and VII), which I construe to seek relief only on the basis of the termination of her position as Director of the OIR.

The parties' papers reveal, as a threshold matter, no disagreement that (i) the plaintiff's discrimination and retaliation claims appropriately are analyzed pursuant to the so-called *McDonnell Douglas* burden-shifting test, and (ii) analysis of her federal claims is dispositive of those brought pursuant to Maine law. *See, e.g.*, Defendant's S/J Motion at 5-6; Plaintiff's S/J Opposition at 4, 9-10; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05 (1973).

As the First Circuit has clarified:

> Under that [*McDonnell Douglas*] framework, a plaintiff employee must carry the initial burden of coming forward with sufficient evidence to establish a prima facie case of discrimination or retaliation. If he does so, then the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's [termination], sufficient to raise a genuine issue of fact as to whether it discriminated against the employee. . . . If the employer's evidence creates a genuine issue of fact, the presumption of discrimination drops from the case, and the plaintiff retains the ultimate burden of showing that the employer's stated reason for terminating him was in fact a pretext for retaliating against him for having taken protected FMLA leave [or other unlawful discrimination].

Hodgens v. General Dynamics Corp., 144 F.3d 151, 160-61 (1st Cir. 1998) (citations and internal quotation marks omitted). I consider whether, with respect to each of the plaintiff's three categories of claims – age discrimination, gender discrimination and retaliation – she has made out a *prima facie* case; if so, whether the defendant has come forward with a legitimate, nondiscriminatory reason for her employment termination; and, if so, whether the plaintiff has raised a triable issue whether the defendant's real reason was retaliation or unlawful discrimination.

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consider any such claim waived.

1. *Prima Facie* Case: Age Discrimination

As the parties agree, *see* Defendant's S/J Motion at 5; Plaintiff's S/J Opposition at 9, an MHRA plaintiff claiming age discrimination in the context of a reduction in force must demonstrate that: (i) she was at least forty years old, (ii) she met her employer's legitimate job-performance expectations, (iii) she experienced an adverse employment action, and (iv) her employer did not treat age neutrally, or younger persons were retained in the same position, *see Brennan v. GTE Gov't Sys. Corp.*, 150 F.3d 21, 26 (1st Cir. 1998); *Thorndike v. Kmart Corp.*, 35 F. Supp.2d 30, 32 (D. Me. 1999) (when analyzing claims under the MHRA, court uses legal framework applicable to parallel federal statutes). As the plaintiff observes, *see* Plaintiff's S/J Opposition at 9, the burden of making out a *prima facie* case is "not onerous[,]" *Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir. 1994) (citation and internal quotation marks omitted), and she meets it.

Not surprisingly, the defendant does not contest that the plaintiff meets the first three prongs of the *prima facie* test. *See* Defendant's S/J Motion at 7. The plaintiff was fifty-eight years old when her job was terminated, she had never been subjected to disciplinary action, and she had always received positive job reviews. *See* Plaintiff's Additional SMF ¶¶ 238, 240; Defendant's Reply SMF ¶¶ 238, 240. The defendant does challenge her ability to meet the fourth prong, *see* Defendant's S/J Motion at 7; however, I conclude that her showing suffices to pass muster.

The plaintiff contends that two younger employees, King (Director of the Office of Academic Assessment) and Davis (Director of the Information Reporting unit of the new IT Division), continue to be employed by USM and to perform institutional research of the same sort she performed prior to her termination. *See* Plaintiff's S/J Opposition at 9. As the defendant points out, *see* Defendant's S/J Motion at 7, neither King nor Davis literally can be said to be performing the same job the plaintiff did: The OIR was

dissolved, and the plaintiff's job technically no longer exists. Nonetheless, the *prima facie* test is broad enough to encompass situations in which an employer technically dissolves an employee's work unit or position but then redistributes that employee's job functions, to the extent they continue to be performed, to a younger employee or employees. *See, e.g., Connell v. Bank of Boston*, 924 F.2d 1169, 1173 (1st Cir. 1991) (plaintiff satisfied final prong of *prima facie* case of age discrimination by presenting evidence that after the date of his termination, two younger persons were hired by the bank unit that ostensibly took on the functions of the dissolved bank unit for which he had worked); *Just v. James River, II, Inc*., 784 F. Supp. 1145, 1150 (D. Del. 1992) (plaintiff satisfied final prong of *prima facie* case of age discrimination by presenting evidence that upon the elimination of his position following a plant reorganization, his job functions were redistributed to a number of people, all of whom were under forty and thus outside of the protected class); *Taulbee v. Blue Bird Baking Co*., 745 F. Supp. 1290, 1293 (S.D. Ohio 1989) ("to the extent Plaintiff's position existed after the sale of the distribution system [*i.e*., after it was reduced to a part-time position], Plaintiff has shown that he was replaced by a younger employee").

The plaintiff adduces no direct evidence that the offices headed by King and Davis perform the same functions (either individually or combined) that the plaintiff did prior to her termination. There is reason to be skeptical that this would be the case with respect to King, who took the position of Director of the Office of Academic Assessment in 2001, long before the plaintiff's job was terminated, *see* Defendant's SMF ¶¶ 21, 25; Plaintiff's Opposing SMF ¶¶ 21, 25, and has testified that her work as Director of that office is no different than when the plaintiff left USM, *see* Defendant's Reply SMF ¶ 177; King Dep. at 29-31.

Nonetheless, the plaintiff does adduce evidence that (i) in a proposal to create the OIR, USM defined "institutional research" as entailing the provision of "information to USM's leadership that it can use

to implement and refine institutional priorities[,]" providing "information and analyses [that] should assist USM in making decisions related to the Strategic Plan, programs and services, and resource utilization (financial, human, and physical)[,]" Plaintiff's Additional SMF ¶ 168; Defendant's Reply SMF ¶ 168, (ii) she did perform a substantial amount of data collection, as well as analysis, while the OIR was in existence, *see* Plaintiff's Additional SMF ¶ 170; Johnson Aff. ¶ 14, (iii) the web site of the Office of Academic Assessment indicates that the office "[c]onducts institutional assessment studies[,]" Plaintiff's Additional SMF ¶ 176; Defendant's Reply SMF ¶ 176, and (iv) and King testified that there is overlap between "academic assessment" and "institutional research[,]" *id*. ¶ 177. A reasonable trier of fact could conclude that, notwithstanding King's testimony to the contrary, her office picked up some quantity of the plaintiff's prior work as Director of the OIR.

In addition, with respect to Davis, the plaintiff adduces evidence that (i) the IT Workgroup Report (issued in October 2004 – subsequent to notification of the plaintiff that the OIR would be dissolved, *see id.* ¶ 184) described the Information Reporting unit as "responsible for the data reporting and analysis USM is required to provide for its various departments and to outside agencies[,]" Plaintiff's Additional SMF ¶ 185; IT Workgroup Report at 2, (ii) this description accurately reflects what the unit has done since its formation, *see* Plaintiff's Additional SMF ¶ 187; Defendant's Reply SMF ¶ 187, and (iii) an IT flow chart on the USM web site describes the unit's functions as entailing, *inter alia*, report writing and data analysis, *see id*. ¶ 188. Here, again, a reasonable fact-finder might infer that Davis's duties as head of the Information Reporting unit track to some degree those the plaintiff performed as head of the OIR.

Inasmuch as the plaintiff (i) indisputably meets the first three prongs of the relevant age-discrimination *prima facie* test and (ii) adduces evidence from which a reasonable trier of fact could

conclude that some of her work functions, to the extent they continued to exist after dissolution of the OIR, were performed by a younger employee or employees, she clears the *prima facie* hurdle.

2. *Prima Facie* Case: Gender Discrimination

The *prima facie* test applicable to claims of gender discrimination in a reduction-in-force context parallels that applicable to claims of age discrimination: "To state a prima facie claim of age and gender discrimination in the context of a reduction in force, the plaintiff must allege facts that show that she is a member of a protected class, that she met her employer's legitimate job expectations, that she was terminated, and that gender and age were not treated neutrally or that males or younger workers were retained in the same position." *Piascik-Lambeth v. Textron Automotive Co.*, No. CIV. 00-258-JD, 2000 WL 1875873, at *6 (D.N.H. Dec. 22, 2000); *see also, e.g., Resare v. Raytheon Co.*, 981 F.2d 32, 43 (1st Cir. 1992) ("Here, plaintiff satisfied her initial burden of making out a prima facie case of sex discrimination. She is a member of the protected class; the evidence is undisputed that plaintiff was performing her job adequately when she was laid off in March 1990; and, there is evidence that males doing the same or similar work were retained.") (footnote omitted).

The plaintiff adduces no evidence that any of her OIR job functions continue to be performed by a male employee or employees. Hence, she falls short of making out a *prima facie* case of gender discrimination. However, even assuming *arguendo* that she cleared this hurdle, as discussed below, her case would founder at a later *McDonnell Douglas* step.

3. *Prima Facie* Case: Retaliation

As the parties agree, *see* Defendant's S/J Motion at 6; Plaintiff's S/J Opposition at 4, for purposes of retaliation claims pursuant to Title VII and the MHRA as well as Maine Whistleblowers' Protection Act claims, a *prima facie* case entails demonstration that (i) the plaintiff engaged in protected conduct, (ii) the

plaintiff suffered an adverse employment action, and (iii) there was a causal connection between those two things, *see, e.g.*, *Dressler v. Daniel*, 315 F.3d 75, 78 (1st Cir. 2003); *Blake v. State*, 868 A.2d 234, 237 (Me. 2005).

There is no dispute that the plaintiff engaged in protected conduct (the 1997 Action) and suffered an adverse employment action (her termination). However, the defendant argues that the plaintiff falls short of demonstrating a causal connection between the two. *See* Defendant's S/J Motion at 8-10. I agree.

As the defendant underscores, *see id*. at 8, it is undisputed that Wood, who made the decision to terminate the OIR, knew nothing about the 1997 Action, *see* Defendant's SMF ¶¶ 97-98; Plaintiff's Opposing SMF ¶¶ 97-98. It is likewise undisputed that only Pattenaude and Wood played any role in the decision to terminate the OIR. *See id*. ¶ 120. The plaintiff attempted to adduce evidence that (i) "[a]t all relevant times, Pattenaude was aware that the Plaintiff had filed and then settled" the 1997 Action, and (ii) "[i]t was common knowledge in the USM administration and staff that the Plaintiff had brought the 1997 Action against USM[,]" Plaintiff's Additional SMF ¶¶ 149-50; however, I sustained the defendant's objections to those statements. That is fatal to the plaintiff's case of retaliation. *See, e.g.*, *Pomales v. Celulares Telefónica, Inc*., 447 F.3d 79, 85 (1st Cir. 2006) ("Temporal proximity can create an inference of causation in the proper case. But to draw such an inference, there must be proof that the decisionmaker knew of the plaintiff's protected conduct when he or she decided to take the adverse employment action.") (citations omitted).

In any event, as the defendant also suggests, *see* Defendant's S/J Motion at 8-10, even had the plaintiff supplied cognizable proof that either Wood or Pattenaude knew about the 1997 Action, her circumstantial evidence of a causal linkup to the 2004 termination decision simply is too weak to generate a triable issue. A period of seven years elapsed between the protected activity and the adverse employment

action. The plaintiff expends considerable energy railing against the dangers of affording employers a "safe harbor" based on a time lapse of that magnitude. *See* Plaintiff's S/J Opposition at 6-7. However, the defendant does not ask the court to make such a *per se* ruling; rather, it merely correctly points out that such a time lapse cuts against the drawing of an inference of causal connection between protected activity and a subsequent adverse job action. *See* Defendant's S/J Motion at 9; *see also, e.g.*, *Dressler*, 315 F.3d at 80 (noting, in case in which two years had elapsed between protected activity and alleged adverse action, "the inference of a causal connection becomes tenuous with the passage of time"); *Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 399 (7th Cir. 1999) ("A substantial time lapse between the protected activity and the adverse employment action is counter-evidence of any causal connection.") (citation and internal quotation marks omitted). Thus, while a seven-year time lapse may not automatically justify summary judgment in a defendant employer's favor, it certainly tends to undercut a plaintiff's case.

The plaintiff has one more arrow in her quiver: She notes that the First Circuit has held that, even if temporal proximity is lacking, "circumstantial evidence of a pattern of antagonism following the protected conduct can also give rise to the inference that a causal connection exists." Plaintiff's S/J Opposition at 5 (quoting *Che v. Massachusetts Bay Transp. Auth.*, 342 F.3d 31, 38 (1st Cir. 2003)). She posits that she has demonstrated such a pattern, citing to (i) the charging of the cost of the 1997 Action against the TAC budget without provision of a commensurate budget increase; (ii) the grant of a three-month rather than a six-month leave of absence; (iii) the 2001 split of the TAC into two sections, over her objections and to her detriment; (iv) the decision to move the TAC's offices during her sabbatical, which effectively deprived her of the full benefit of the sabbatical by diverting her attention to office-move matters, (v) the grant of only a two-week, rather than a three-month, extension of her sabbatical, (vi) the failure to invite her to participate in, or offer input with respect to, the draft of the 2001 OIR Proposal, even though she was by far the most

qualified and experienced institutional researcher at USM, (vii) the 2002 denial of her request to fill a research-assistant vacancy, followed by non-fulfillment of a subsequent promise to return to the OIR budget an amount equal to one-half of the salary of a graduate assistant to help with the work, (viii) the 2003 move of the OIR to less desirable space than all other research units housed in the John Roberts Road facility, and (ix) the denial of repeated requests that she be permitted to attend Wood's Provost staff meetings. *See id*. at 7-9.[73]

Nonetheless, *Che* refers to a pattern of incidents that are "antagonistic" in the sense that they evidence differential treatment or discriminatory conduct, not in the sense that they upset, anger or inconvenience a claimant. *See Che*, 342 F.3d at 38 ("Evidence of discriminatory or disparate treatment in the time period between the protected activity and the adverse employment action can be sufficient to show a causal connection."). With respect to all but one of the allegedly antagonistic incidents the plaintiff catalogues, she offers not a shred of evidence from which a reasonable fact-finder could infer that she was treated differently than similarly situated persons or that the action of which she complains was animated by discriminatory purpose, as opposed to a standard practice or a business judgment on the part of USM. She does assert that, when it came time to move from the John Roberts Road facility in 2003, the OIR was treated worse than all other research units with which it had been housed: While those units were moved into a newly built research facility, the OIR and the plaintiff were not given the opportunity to join them. *See* Plaintiff's Additional SMF ¶ 179; Defendant's Reply SMF ¶ 179. However, the defendant supplies a reason for the differential treatment – that the other research people were science research faculty. *See* Defendant's Reply SMF ¶ 179; Wood Dep. at 44-45. In any event, one incident does not a pattern make.

[73] The plaintiff also cited to a renewed salary disparity with her male counterparts. *See* Plaintiff's S/J Opposition at 8; (*continued on next page*)

Thus, as modest as is the burden of making out a *prima facie* case, *see, e.g., Che*, 342 F.3d at 38, the plaintiff fails to do so with respect to her retaliation claims. For the reasons that follow, even assuming *arguendo* that she had succeeded, those claims nonetheless would falter at a later *McDonnell Douglas* stage.

4. Articulation of Legitimate, Non-Discriminatory Reason for Action

A plaintiff having made out a *prima facie* case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action taken (in this case, termination of the plaintiff's position as Director of the OIR). *See, e.g., Che*, 342 F.3d at 39. The defendant meets that burden, asserting (and proffering evidence tending to show) that "Wood eliminated the OIR based on a reasonable determination that Johnson's work was not essential to USM, and $150,000 of direct savings could be realized by eliminating the office." Defendant's S/J Motion at 7; *see also, e.g.*, Defendant's SMF ¶¶ 93, 96; Plaintiff's Opposing SMF ¶¶ 93, 96. This having been done, "the inference of discrimination" arising from demonstration of a *prima facie* case "fades away." *Che*, 342 F.3d at 39. The burden shifts back to the plaintiff "to show that the adverse employment action was the result of discriminatory animus." *Id*.

Plaintiff's Additional SMF ¶ 152. However, I sustained the defendant's objection to that statement.

5. Evidence of Pretext, Discriminatory Animus

The defendant, finally, argues for summary judgment as to all of the plaintiff's discrimination and retaliation claims on the basis of her failure to generate a triable issue that its stated reasons for termination of her position were pretextual or its real reasons discriminatory. *See* Defendant's S/J Motion at 10-18. The plaintiff rejoins that she makes a compelling case with respect to both. See Plaintiff's S/J Opposition at 10-19. The defendant has the better of the argument.

As the plaintiff points out, to prove pretext and discriminatory animus, she is "not [. . .] required to produce 'smoking gun' evidence before prevailing[.]" Plaintiff's S/J Opposition at 10 (quoting *Mesnick v. General Elec. Co.*, 950 F.2d 816, 824 (1st Cir. 1991)). In endeavoring to carry the third-stage *McDonnell Douglas* burden, "many veins of circumstantial evidence may be mined." *Rathbun*, 361 F.3d at 72 (citation and internal punctuation omitted). "These include – but are by no means limited to – evidence of differential treatment, evidence of discriminatory comments, statistical evidence, and comparative evidence." *Id*. Moreover, "[i]n a proper case, the trier may infer the ultimate fact of discrimination from components of the plaintiff's prima facie showing combined with compelling proof of the pretextual nature of the employer's explanation." *Id*.

"At all times, however, the plaintiff retains the ultimate burden to show that [s]he has been the victim of intentional discrimination." *Provencher v. CVS Pharmacy*, 145 F.3d 5, 10 (1st Cir. 1998); *see also, e.g., Azimi v. Jordan's Meats, Inc*., 456 F.3d 228, 246 (1st Cir. 2006) ("Although an employer's good faith belief is not automatically conclusive, it is not enough for a plaintiff merely to impugn the veracity of the employer's justification; he must elucidate specific facts which would enable a jury to find that the reason given is not only a sham, but a sham intended to cover up the employer's real and unlawful motive of discrimination.") (citations and internal punctuation omitted).

The plaintiff contends she offers compelling proof of the falsity of the defendant's twin budgetary and redundancy explanations for the termination of her position, buttressed with evidence (such as the remarks of Kamen and Barnes) tending to show discriminatory animus. *See* Plaintiff's S/J Opposition at 18-19. Her evidence does not live up to its billing. Her proof of pretext is too weak, and her additional evidence of discriminatory animus insufficiently probative, to permit a reasonable trier of fact to conclude that the defendant disbanded the OIR and terminated the plaintiff's employment on the basis of age, gender or retaliatory animus against her.

The plaintiff articulates five bases on which the defendant's budgetary explanation for her job loss should be seen as a sham, to wit, that:

1. The amount Wood claimed to need to cut from his budget ($450,000) totaled only 0.8 percent of the Division of Academic Affairs' base budget for 2004-05 of approximately $53 million, and the $150,000 supposedly saved by elimination of the OIR represented even a smaller percentage of that total base budget: 0.3 percent. *See* Plaintiff's S/J Opposition at 10-11; *see also* Plaintiff's Additional SMF ¶ 224; Defendant's Reply SMF ¶ 224; Defendant's SMF ¶¶ 76, 110; Plaintiff's Opposing SMF ¶¶ 76, 110. In light of these percentages, she reasons, it is hard to lend credence to the University System's claim that a budget crisis compelled dissolution of the OIR, particularly in view of Wood's professed distaste for eliminating department functions and his admission that institutional research was an important function. *See* Plaintiff's S/J Opposition at 11.

2. Wood's assertion that he "had" to make budget cuts in 2004-05 is at best an overstatement – or rings hollow – in view of the fact that Andrews, the chief financial officer, testified that if departments fail to meet their budget projections, "there are no rules that dictate penalties or otherwise[,]" and failure to

meet a budget in any given fiscal year has no negative implications for a department's budget for the following fiscal year. *See id*.; Plaintiff's Opposing SMF ¶ 74; Andrews Dep. at 18.

3. Although Wood told her on October 12, 2004 that he had "squeezed as much out of the faculty lines" as he could, less than ten months later USM hired thirty-two faculty members, all of whom fall under the Division of Academic Affairs budget. *See* Plaintiff's S/J Opposition at 11-12; Defendant's SMF ¶ 106; Plaintiff's Opposing SMF ¶ 106, Plaintiff's Additional SMF ¶ 227; Defendant's Reply SMF ¶ 227. Further, on January 1, 2005, before the OIR was even dissolved, Wood created a new position, that of Associate Vice-President for Academic Affairs, and brought a person from another division, and another budget, to fill it. *See* Plaintiff's S/J Opposition at 12; Plaintiff's Additional SMF ¶ 222; Defendant's Reply SMF ¶ 222. The new position pays more than $82,000 a year, hence it is reasonable to assume that, with associated benefits, it increased base budget by more than $100,000, wiping out two-thirds of the savings supposedly realized by elimination of the OIR. *See* Plaintiff's S/J Opposition at 12; Plaintiff's Additional SMF ¶ 223; Defendant's Reply SMF ¶ 223.

4. Even assuming *arguendo* that Wood was compelled to make $450,000 in base budget cuts in 2004-05, he could have done so in a number of ways other than terminating the plaintiff's position; for example, by moving the OIR to the new IT Division, by making the OIR its own admittedly tiny division, reporting directly to the President (which would have removed it from Wood's division), by spreading the $450,000 shortfall *pro rata* across departments, as had been suggested in 2003, or by charging University System departments for research performed by the OIR or having the plaintiff apply for soft-money grants to defray its costs. *See* Plaintiff's S/J Opposition at 12-13; *see also, e.g.*, Plaintiff's Additional SMF ¶¶ 189-90; Defendant's Reply SMF ¶¶ 189-90.

5. For all of the University System's purported financial woes, the plaintiff was the only USM employee to lose her position "irrevocably" between 2000 and 2005 for budgetary reasons. *See* Plaintiff's S/J Opposition at 13; Plaintiff's Additional SMF ¶ 147; Defendant's Reply SMF ¶ 147.

None of these facts demonstrates that USM's budgetary rationale for elimination of the OIR was false. It is undisputed that (i) USM has been faced with a series of financial challenges over the past few years, *see* Defendant's SMF ¶ 72; Plaintiff's Opposing SMF ¶ 72; (ii) USM has experienced dramatic increases in costs, the specter of ongoing deficits and dramatic reductions in state financial support, *see id.* ¶ 73; (iii) Wood learned in spring 2004 that, for the third year in a row, he had to cut his Division of Academic Affairs budget in order to balance it, *see id.* ¶ 76; (iv) the amount he needed to cut to balance the budget was $450,000, *see id.*, (v) beginning in 2003, USM President Pattenaude met with Wood several times to discuss how he would reduce his budget by the required amount of $450,000, during which conversations Wood raised the possibility of eliminating the OIR, *see id.* ¶ 88, and (vi) elimination of the OIR effectuated a $150,000 permanent base-budget savings, *see id.* ¶ 96 – approximately one-third of the target $450,000 budget cut.

In these circumstances, even granting that (i) the OIR budget represented a very small percentage of the overall Academic Affairs budget, (ii) Wood would not have suffered budgetary penalties or consequences the following fiscal year if he failed to make the requested budget cut in 2004-05, (iii) the plaintiff was the only person whose position at USM was "irrevocably" terminated between 2000 and 2005 for budgetary reasons, and (iv) Wood could have cut the budget in different ways that would have preserved the OIR, none of those things tends to prove that Wood did not have budgetary reasons for terminating the OIR.

Nor do events transpiring subsequent to the decision to terminate the OIR, as explained by the defendant, tend to show that the OIR termination decision was pretextual. As the defendant argues, faculty members go, new ones come, and resources must be allocated consistent with a university's mission of allocating its students. *See* Defendant's S/J Reply at 9. The defendant adduces evidence that USM had a net increase of six new full-time faculty appointments in 2005-06, with five of the six net new appointments representing new permanent appointments to tenure-track positions in four high student-demand areas, and that the cost of that net increase was expected to be offset by corresponding increase in tuition revenue. *See id*.; Defendant's Reply SMF ¶ 227; Second Wood Aff. ¶¶ 9-14. With respect to Campbell's transfer to the job of Associate Vice-President for Academic Affairs, the defendant explains that the money to cover her salary came from the budget for the Division of Enrollment Management, to which she had previously been assigned, and savings from the replacement of Wood's retiring assistant with a new assistant permitted him to provide Campbell with a raise upon her reclassification. *See* Defendant's Reply SMF ¶ 223; Second Wood Aff. ¶¶ 9-14.

The plaintiff next contends that she establishes the falsity of the "redundancy" explanation for termination of her position inasmuch as institutional research continues to be done at USM, albeit in a different guise. *See* Plaintiff's S/J Opposition at 14-15. She observes that (i) despite USM's assurances to the NEASC that it has made advancements in the area of institutional research, the centralized, University System-wide OPPA is not doing any institutional research requested specifically by USM or directed specifically to USM, facts from which one reasonably can infer that such research is being performed at the USM level, *see id*.; Plaintiff's Additional SMF ¶ 233; First Pattenaude Aff. ¶ 13; (ii) King (the Director of the Office of Academic Assessment) conceded that institutional research and academic affairs overlap, and her office's web site describes the office as performing institutional-assessment studies, *see* Plaintiff's S/J

Opposition at 15; Plaintiff's Additional SMF ¶¶ 176-77; Defendant's Reply SMF ¶¶ 176-77, (iii) the description of the IT Division's Information Reporting unit (which Davis, the Director of Information Reporting, agreed accurately described the unit's functions) and an IT flow chart indicate that some of the work performed by that unit really is institutional research, *see* Plaintiff's S/J Opposition at 15; Plaintiff's Additional SMF ¶¶ 185, 187-88; Defendant's Reply SMF ¶¶ 185, 187-88, and (iv) according to USM, the Information Reporting unit and the Office of Academic Assessment are "work[ing] collaboratively . . . to integrate institutional data with assessment data[,]" Plaintiff's S/J Opposition at 16 (quoting NEASC Interim Report, Plaintiff's Additional SMF ¶ 232; Defendant's Reply SMF ¶ 232).

However, as the defendant rejoins, *see* Defendant's S/J Reply at 10, Wood stated that growing institutional-research capacity at the University System level made the OIR "somewhat redundant," not entirely redundant, *see* Defendant's SMF ¶ 106; Plaintiff's Opposing SMF ¶ 106. Further, Wood acknowledged that, without the OIR, USM would have to find a way to get critical reports done. *See* Defendant's S/J Reply at 10; Defendant's SMF ¶ 107; Plaintiff's Opposing SMF ¶ 107. That others within USM have picked up some of the OIR's functions does not attest to the falsity of the premise that USM could get along without the OIR. *See, e.g., Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 153 F. Supp.2d 62, 72 (D. Mass. 2001), *aff'd*, 282 F.3d 60 (1st Cir. 2002) ("[A] position elimination defense is not defeated because another employee is designated to carry out some or all of the fired employee's duties or because those duties are otherwise reallocated within the existing work force.") (citation and internal punctuation omitted).

I turn, finally, to the plaintiff's evidence of discriminatory animus, to wit, that:

1. It is uncontroverted that, despite her request to be placed on a union-mandated recall list, and the University System's offers of job-placement assistance, the University System never had any real

intention to bring her back. *See* Plaintiff's S/J Opposition at 16-17; Plaintiff's Additional SMF ¶¶ 211-12, 214-15; Defendant's Reply SMF ¶¶ 211-12, 214-15.

2. Kamen, the University System's designated representative during Step 3 of the union contract grievance process, admitted that firing the plaintiff was a "test case" to see what type of documentation the University System would need in order to eliminate higher paid employees. *See* Plaintiff's S/J Opposition at 17; Defendant's SMF ¶ 131; Plaintiff's Opposing SMF ¶ 131. This remark, in the plaintiff's view, evidences age discrimination inasmuch as it was clearly directed at older, and generally higher paid, persons and, rather than constituting a stray remark by a co-worker, emanated from the person designated by the University System to address specific reasons for her termination. *See* Plaintiff's S/J Opposition at 17-18.

3. Barnes told the plaintiff that he had spoken to someone at the Dean's level who informed him that she was perceived as a "bitch" or "bitchy" and as a "troublemaker" because of her filing of the 1997 Action, and that USM was going to find a way to get rid of her. *See* Plaintiff's S/J Opposition at 18; Defendant's SMF ¶ 123; Plaintiff's Opposing SMF ¶ 123. The plaintiff acknowledges that Barnes denies attributing these derogatory remarks to anyone in particular; however, she says she clearly remembers these comments, and it should be left to a jury to determine whose recollection is faulty. *See* Plaintiff's S/J Opposition at 18 n.16. She argues that it hard to imagine more compelling evidence of animus absent a smoking gun. *See id*. at 18.

The defendant disputes that Kamen's alleged comments can be attributed to a decision-maker or, in any event, are probative of age discrimination. *See* Defendant's S/J Motion at 12-14; Defendant's S/J Reply at 11. I agree that, even assuming *arguendo* that these comments can be said to reflect Wood's and/or Pattenaude's mindset in proposing or approving of elimination of the plaintiff's job, they are not, as a

matter of law, probative of age discrimination. In *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the United States Supreme Court clarified that "there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." *Hazen*, 507 U.S. at 609. This is true "even if the motivating factor is correlated with age, as pension status typically is." *Id*. at 611.

A person's salary is, at best, loosely correlated with age. Even assuming *arguendo* that Wood and/or Pattenaude wanted to eliminate the plaintiff's position in whole or in part because she was a more highly paid employee, that does not tend to prove that either was motivated by age bias. *See, e.g.*, *Cruz-Ramos v. Puerto Rico Sun Oil Co*., 202 F.3d 381, 385-86 (1st Cir. 2000) (remark by decision-maker that appellant was selected for furlough because he would be less affected than others inasmuch as, by virtue of his age and years of service, he qualified for early retirement not probative of age discrimination; citing *Hazen* for proposition that "[a]s a matter of federal law, employment decisions sparked by factors other than age, such as pension status, do not prove age discrimination even though such factors correlate with age to some extent."); *Hanebrink v. Brown Shoe Co*., 110 F.3d 644, 647 (8th Cir. 1997) (rejecting appellant's argument that combination of his higher salary, potentially higher retirement benefits and potentially more expensive health benefits raised inference that he was laid off on basis of age discrimination; citing *Hazen* for proposition that "[e]mployment decisions motivated by characteristics other than age (such as salary and pension benefits), even when such characteristics correlate with age, do not constitute age discrimination.").

Nor do Barnes' alleged lunchtime comments gain the plaintiff any traction in her efforts to resist summary judgment. It is undisputed that Barnes has never spoken to either Wood or Pattenaude about the elimination of the OIR and the plaintiff's position. *See* Defendant's SMF ¶ 126; Plaintiff's Opposing SMF ¶ 126. Even assuming *arguendo* the truth of comments he now denies having made, they are classic "stray

remarks." *See, e.g., Wallace v. O.C. Tanner Recognition Co.*, 299 F.3d 96, 101 (1st Cir. 2002) ("Typically, statements made by one who neither makes nor influences a challenged personnel decision are not probative in an employment discrimination case.") (citation and internal punctuation omitted); *Shorette v. Rite Aid of Me., Inc.*, 155 F.3d 8, 13 (1st Cir. 1998) ("stray remarks in the workplace, statements by nondecisionmakers, or statements by decisionmakers unrelated to the decisional process itself normally are insufficient to prove employer's discriminatory animus") (citation and internal punctuation omitted).

The plaintiff's remaining evidence of animus – that the University System did not wish to rehire her – coupled with her weak challenge to the veracity of Wood's stated reasons for her termination, are insufficient to raise a triable issue whether the OIR, and her position, were terminated on the basis of age, gender or retaliatory bias against her.

IV. Conclusion

For the foregoing reasons, I **GRANT** the defendant's motion to exclude a portion of the testimony of expert Mark Filler and recommend that its motion for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 25th day of September, 2006.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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